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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

J. G. BOSWELL COMPANY,
Petitioner,

v.

KEN WEGIS, JACK THOMSON, and
JEFF THOMSON,
Respondents.

Petition for a Writ of Certiorari to the Court of Appeal of California Fifth Appellate District

PETITION FOR A WRIT OF CERTIORARI

WILLIAM M. BURKE
Counsel of Record

THOMAS S. MARTIN
WENDY E. ACKERMAN
SHEARMAN & STERLING
801 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004
(202) 508-8000

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1. Whether California's procedures for awarding punitive damages violate the Due Process Clause by failing to provide for meaningful judicial review, particularly insofar as they (1) permit reviewing courts to reverse or reduce only those awards that are the result of the jury's passion and prejudice; (2) fail to require trial judges to specify in the record their reasons for refusing to reverse or reduce punitive damages verdicts; and (3) preclude reviewing courts from engaging in a comparative analysis of awards imposed in similar cases.

2. Whether the Due Process Clause is violated by a punitive damages award of $10.5 million that (1) is rendered by a jury found by the trial and appellate courts to have been inflamed by passion and prejudice; (2) is 17.5 times the amount of compensatory damages; (3) is imposed to punish the defendant for the mere filing and publication of a lawsuit without any resulting physical or economic injury; and (4) impinges on the important constitutional right of access to the courts.

RULE 29.1 STATEMENT

J.G. Boswell Company has no parent corporation. It has the following non-wholly-owned subsidiaries:

Phytogen (86% owned by J.G. Boswell Company)
Corcpork Company (50% owned by J.G. Boswell Company)

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PETITION FOR A WRIT OF CERTIORARI

J.G. Boswell Company ("Boswell") respectfully petitions this Court for a writ of certiorari to review the judgment of the Court of Appeal of California, Fifth Appellate District, in this case.

OPINIONS BELOW

The opinion of the California Court of Appeal, Fifth Appellate District, upholding the punitive damages award (App. A, *infra*, 1a-65a), was ordered not to be published by that court. The order of the Supreme Court of California denying discretionary review (App. B, *infra*, 66a) is unreported, as is the order of the trial court (App. C, *infra*, 67a-68a).

JURISDICTION

The judgment of the California Court of Appeal, Fifth Appellate District, was entered on June 14, 1991. The Court of Appeal denied a timely petition for rehearing on July 11, 1991. Thereafter, on October 3, 1991, the Supreme Court of California denied a petition for review. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment provides, in pertinent part:

> "[N]or shall any State deprive any person of * * * property, without due process of law * * * *"

STATEMENT

A. The Factual Background

Boswell is a private corporation engaged in farming in the State of California. In 1982, Boswell actively participated in the California political contest over Proposition 9, a referendum that would have authorized the construction and public funding of the Peripheral Canal. This canal was designed to supply water from northern California to the central and southern parts of the state. App., *infra*, 3a-4a. Boswell opposed the measure, choosing to support an alternative proposal called the "Through Delta Facility" that it believed provided a better way to meet the water needs of central and southern California. *Id.* at 4a. Respondents were members of, or contributors to, Family Farmers for Proposition 9, a political association of farmers in the Kern County area that favored the canal. *Ibid.*

On May 10, 1982, Family Farmers published an advertisement in two California newspapers that was designed to subject Boswell to hatred, contempt, and ridicule. *Ibid.* Specifically, the advertisement repeatedly

linked Boswell with Salyer, another farming concern; cited the size, financial strength, political contributions, and water resources of both companies; and stated that the companies were engaged in a combination or conspiracy to restrain trade ("to freeze out competition" and "totally dominate California agriculture"). *Id.* at 4a, 8a. Further, the advertisement implied that overt acts in furtherance of the conspiracy were taking place (*i.e.*, opposition to Proposition 9) so that the conspiracy could exercise monopoly power in the marketplace, including "setting prices where they want them." *Id.* at 8a.

Boswell's management was understandably outraged at the disparaging advertisement. *Id.* at 5a; Tr. 661:16-17; 895-97; 928-29. Seeking legal advice on the matter, Boswell's general counsel consulted a trial attorney with considerable experience and knowledge of libel law. The attorney opined that Boswell had a valid cause of action for libel *per se*. App., *infra*, 6a; Tr. 2625:21-24; 2442-44. Boswell thereupon filed suit against Respondents. The complaint alleged that the Family Farmers' advertisement constituted libel *per se* because it charged Boswell with the commission of a crime: a conspiracy to defeat Proposition 9 in order to fix prices and freeze out competition in the making, sale, or purchase of commodities. App., *infra*, 6a-7a. Pursuant to California's newspaper shield law, Boswell's counsel also informed various newspapers of Boswell's pending libel action, enclosing the face sheet of Boswell's complaint together with explanatory letters. *Id.* at 7a; Tr. 1075; 2442-43; 2516-18. The letters requested a clarification from those newspapers that had published the advertisement and informed the other newspapers that the advertisement contained false and libelous statements. App., *infra*, 7a; Tr. 2442-43. One of the newspapers ultimately printed a clarification. App., *infra*, 7a.

Following commencement of the libel action, Respondents continued their activities in support of Proposition 9; nevertheless, the measure was overwhelmingly rejected by California voters.

B. The Proceedings Below

In September 1984, the trial court granted summary judgment in Respondents' favor on Boswell's libel complaint. *Id.* at 8a. The California Court of Appeal affirmed on June 2, 1986. *Ibid.* In a lengthy analysis, the court relied on the approach rejected by this Court in *Milkovich v. Lorain Journal Co.*, 110 S. Ct. 2695, 2706-07 (1990), and held that because the assertions of an unlawful conspiracy in the advertisement were part of a constitutionally protected statement of opinion, they were not defamatory as a matter of law. App., *infra*, 9a.

Respondents had previously filed cross-complaints against Boswell alleging intentional interference with their constitutional rights and abuse of process, and subsequently amended those complaints to include a claim for malicious prosecution. Respondents proceeded to trial on their cross-complaints, seeking compensatory damages for emotional distress, as well as punitive damages.

At trial, Respondents' counsel cultivated an atmosphere of fierce and inflammatory invective specifically calculated to prejudice the jury against Boswell. Respondents' counsel told the jury, among other things, that the mentality of Boswell's management resembled that of Nazi leaders (Tr. 3414:15-16); that Boswell's management style resembled the oppressive regimes of "communist countries" (Tr. 3031:16-17); that "our jails are full" of people like Boswell's management who "will never tell you what was on their minds" (Tr. 3037:26-3038:5); and that Boswell, like Ivan Boesky, had profited from confidential information and was guilty of insider trading (Tr. 4626-27). In addition, Respondents' counsel repeatedly referred to Boswell as a "virtual giant," a "vir-

tual Goliath," and a "ruthless unfeeling corporate monster" that was intent on destroying Respondents and depriving them of their hard-earned savings. (Tr. 451:7-10; 3030; 3031:6-13; 3034:13-17).

The primary evidence produced by Respondents on the issue of damages was their own testimony that they "worried" about Boswell's libel action and its effect on their future (Tr. 1703:11-26), and were "anxious," "apprehensive," "concerned," and "upset" about the lawsuit and about events that never occurred, such as the possible loss of crop financing (Tr. 1262; 1705:10; 2103-04; 2106:16-18). There was no evidence that Respondents sought any medical, psychiatric, or therapeutic treatment or suffered any physical injury as a result of Boswell's lawsuit. Nevertheless, on July 15, 1988, the jury found Boswell liable on each of Respondents' claims and awarded $3 million in compensatory damages and $10.5 million in punitive damages.

On September 19, 1988, the trial court conditionally granted Boswell's motion for a new trial, contingent upon the refusal of Respondents to accept an 80% reduction in the amount of compensatory damages to $200,000 per individual. App., *infra*, 67a-68a. According to the trial court, the amount of compensatory damages awarded to each Respondent was "excessive" due to the jury's "passion and prejudice against Defendant engendered by the 'David vs. Goliath' character of the case." *Id.* at 68a. In addition, the trial court found that Respondents had suffered no "disabling" emotional distress or "permanent damage" and "no special damages were proved." *Ibid.* Despite its reduction of the compensatory damages, the trial court refused to reduce the jury's punitive damages award. The court rejected Boswell's arguments that the $10.5 million award violated the company's due process rights. *Ibid.*

On June 14, 1991, the Court of Appeal, in an unpublished opinion, affirmed the jury's verdict on the counts

of malicious prosecution and abuse of process, reversing only the verdict on the count of interference with constitutional rights. *Id.* at 37a. Although the appellate court sustained the trial court's reduction of the compensatory damages award due to passion and prejudice, it refused to reduce the punitive damages award. The court summarily rejected Boswell's due process challenges, concluding that California's procedures provide "meaningful review of the jury's punitive award" both at the trial and appellate level. *Id.* at 51a. The court also stated that it was bound by a 1974 California Supreme Court decision upholding the procedures. *Ibid.* (citing *Bertero v. National General Corp.*, 529 P.2d 608, 624 n.12 (Cal. 1974)).

The Court of Appeal then held that (1) the trial court's finding that the $10.5 million punitive award was not based on passion and prejudice was neither "irrational [n]or arbitrary" (App., *infra*, 54a); (2) that the award bore a reasonable relationship to the compensatory award (*id.* at 53a-55a); and (3) that the award was "not excessive or disproportionate" because it "represent[ed] slightly under 10 percent of Boswell's total net assets, but only 1.3 percent of Boswell's gross assets" (*id.* at 55a).

The Court of Appeal denied a petition for rehearing on July 11, 1991. On October 3, 1991, the California Supreme Court rejected Boswell's petition for review, with Chief Judge Lucas dissenting. *Id.* at 66a.

REASONS FOR GRANTING THE WRIT

Last Term, this Court "note[d] once again [its] concern about punitive damages that 'run wild.'" *Pacific Mutual Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1043 (1991). The Court in *Haslip* established for the first time that the procedures for awarding punitive damages, as well as particular awards themselves, may offend traditional notions of fundamental fairness and due process. The lower courts, however, are in disarray over the

proper application of *Haslip*, and continue to uphold both excessive awards and arbitrary procedures that "jar one's constitutional sensibilities." *Haslip*, 111 S. Ct. at 1046. The lottery system of punitive damages awards, in turn, adversely affects this nation's economy, infringes on the exercise of fundamental rights, and results in individual unfairness inimical to our system of justice.

This case is the archetype of a punitive damages award "run wild." To begin with, the massive $10.5 million award was imposed without any of the important procedural protections that *Haslip* found to be indispensable to due process. Rather, it was imposed by a jury with unlimited discretion, and upheld under an extremely deferential standard of review that provided little, if any, protection against arbitrary or excessive jury awards. Indeed, the California procedures have two features that vitiate any practical opportunity for meaningful review. By failing to require a statement of reasons for upholding the punitive award from the trial court, California courts deny themselves information essential to any independent review. And California's extraordinary prohibition against comparing punitive awards in other cases invites wildly disparate and unpredictable economic punishment for similar conduct.

In light of these flawed procedures, it is not surprising that the substance of the $10.5 million award below bears no rational relationship to the goals of retribution and deterrence. It was assessed by a jury found by both the trial and appellate courts to have been tainted by passion and prejudice. It was 17.5 times the amount of compensatory damages. And it was imposed for the mere filing and publication of a lawsuit—conduct that is not only subject to First Amendment protection, but did not result in any physical or economic injury or in any way threaten public health or safety. Under any rational understanding of *Haslip*, the enormous award in this case cannot pass constitutional muster.

The unfairness of California's punitive damages procedures in general, and of this award in particular, is not the only basis for certiorari. Equally important is the continuing uncertainty over the appropriate constitutional standards governing the award of punitive damages. Although the Court addressed this subject only last Term, a single decision—involving a single state's procedures—has proven inadequate to lead the lower courts through this new and difficult constitutional terrain.[1] Constitutional issues concerning awards of punitive damages continue to be raised frequently across the country. Litigation of punitive damages cases, the awards themselves, and activities forgone by business to avoid arbitrary and excessive awards all continue to create tremendous costs. There is thus immediate need for another decision by this Court to provide further guidance to the lower courts. This case, which presents a broad array of procedural and substantive due process issues with widespread significance, is the appropriate occasion for the Court's next decision.

I. THE UNCERTAINTY IN THE LOWER COURTS DEMONSTRATES THE NEED FOR A BENCHMARK DECISION ENFORCING DUE PROCESS CONSTRAINTS ON TRADITIONAL STATE PUNITIVE DAMAGES PROCEDURES

Although it could not "draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case" (111 S. Ct. at 1043), this Court in *Haslip* did set forth a basic framework for reviewing punitive damages awards under the Due Process Clause. Unfortunately, the lower courts

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[1] See Barrett, *Punitive Awards Still Flummox Lower Courts*, Wall St. J., Dec. 5, 1991, at B1 ("The Supreme Court, in theory, issues the last word on vexing constitutional questions, giving guidance to lower courts and litigants. But the theory isn't working with punitive damages.").

have been wholly inconsistent in their application and interpretation of this framework, thereby adding to the unpredictability of punitive damages awards. Many courts, including the California courts, have paid little more than lip service to the decision, continuing to uphold punitive damages procedures that flagrantly contravene due process. In this case, for example, the Court of Appeal upheld the California system despite that system's deferential passion and prejudice standard, its failure to require trial courts to specify reasons in the record for upholding punitive damages awards, and its prohibition against comparison of awards in similar cases.

By the same token, other courts have continued to uphold procedures that lack meaningful and detailed standards for reviewing the reasonableness of punitive damages awards. See, *e.g.*, *Eichenseer v. Reserve Life Ins. Co.*, 934 F.2d 1386 (5th Cir. 1991) (upholding Mississippi's deferential passion and prejudice appellate review standard); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085 (5th Cir. 1991) (upholding Texas' deferential passion and prejudice review standard); *Oberg v. Honda Motor Co.*, 814 P.2d 517 (Or. Ct. App. 1991) (upholding Oregon's procedure that prohibits appellate courts from setting aside punitive damages verdicts as excessive and limits review to "no evidence" standard); *Wolf v. Goodyear Tire & Rubber Co.*, 808 S.W.2d 868 (Mo. App. 1991) (upholding Missouri's deferential abuse of discretion standard of review). Indeed, at least one court has held that due process does not even require punitive damages to bear a relationship to the compensatory award. See *Hospital Authority of Gwinnett County v. Jones*, 409 S.E.2d 501, 502-03 (Ga. 1991) (upholding Georgia's deferential review process).

Courts also continue to sustain exorbitant punitive damages awards that are entirely disproportionate to the amount of compensatory damages and to defendants' culpability, as if *Haslip* had never been decided. In the pres-

ent case, for example, the California Court of Appeal sustained a $10.5 million punitive damages verdict that was 17.5 times the amount of compensatory damages and wholly disproportionate to Boswell's conduct. See also *Eichenseer*, 934 F.2d at 1386 (upholding $500,000 punitive damages award that was 500 times the compensatory damages); *Principal Financial Group v. Thomas*, 585 So. 2d 816 (Ala. 1991) (upholding a $750,000 punitive damages award that was 750 times the amount of compensatory damages); *Hospital Authority of Gwinnett County v. Jones*, 409 S.E.2d at 502-03 (upholding a $1.3 million punitive damages award even though the actual harm was "slight" and plaintiff received only $5,001 in actual damages); *The Narrows v. Gotham Ins. Co.*, No. 3AN-89-09272-Civil (Alaska Super. Ct. 1991) (appeal docketed Nos. S-4388 & 4723) ($61 million punitive damages award returned by jury and upheld by trial court; awarded for delay in reviewing claim under $280,000 insurance policy).

The foregoing decisions are wholly incompatible with those decisions that have actually heeded *Haslip*. Three courts, for example, have recently found passion and prejudice standards similar to California's to be inconsistent with that decision. See *Johnson v. Hugo's Skateway*, Nos. 90-2499, 90-2509 (4th Cir. Nov. 22, 1991); *Fleming Landfill, Inc. v. Garnes*, No. 20284 (W. Va. Dec. 5, 1991); *Gamble v. Stevenson*, 406 S.E.2d 350 (S.C. 1991). See also *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991) (finding that South Carolina law for awarding punitive damages, applied by federal courts sitting in diversity, violates due process "because its lack of meaningful standards allowed the jury to exercise unconstrained discretion in making its awards"). In addition, several courts have concluded—contrary to the California courts—that *Haslip* requires trial courts to explain their reasons for upholding punitive damages verdicts. See *American Employers Ins. Co. v. Southern Seeding Serv.*, 931 F.2d 1453, 1458 (11th Cir. 1991); *Robertson*

Oil Co., Inc. v. Phillips Petroleum Co., 930 F.2d 1342, 1347 (8th Cir. 1991); *Fleming Landfill, Inc. v. Garnes*, slip op. at 28; *Gamble*, 406 S.E.2d at 354. And one court found a $12.5 million award to be inconsistent with *Haslip* on the ground that it was not reasonably related to the compensatory damages and was disproportionate to the severity of the defendant's misconduct. See *Alexander & Alexander, Inc. v. B. Dixon Evander & Assocs.*, 596 A.2d 687, 711 (Md. Ct. Spec. App. 1991).

The need to end this uncertainty in the law of punitive damages is a matter of concrete economic significance. The President's Council on Competitiveness, under the chairmanship of Solicitor General Kenneth A. Starr, recently concluded that the current punitive damages system "continues to generate disproportionately high awards in a random and capricious manner." Report of the President's Council on Competitiveness, AGENDA FOR CIVIL JUSTICE REFORM IN AMERICA 22 (Aug. 1991). The Council recommended action "to reduce the threat of runaway jury verdicts, promote settlements, and promote certainty in commercial transactions by establishing the boundaries for awards." *Id.* at 23. The point made by the President's Council with respect to litigation in general applies with special force to punitive damages; such "[u]nrestrained litigation necessarily exacts a terrible toll on the U.S. economy" and has "baleful effect" in both domestic and international markets. *Id.* at 1.[2]

Moreover, the longer the parade of disproportionate penalties marches on, the more socially desirable behavior will be deterred. See Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40

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[2] Not only do "foreign competitors often have product liability insurance costs that are 20 to 50 times lower than U.S. companies" (*id.* at 3), but liability concerns have led companies to withdraw a number of products, discontinue product research, and lay off workers (*ibid.*).

Ala. L. Rev. 831, 858-60 (1989). Such overdeterrence is particularly harmful where, as here, the penalty is assessed for conduct subject to protection under the First Amendment, *i.e.*, petitioning the courts. Substantial damages to the public welfare will ensue if Boswell and other companies forgo the initiation of valid actions for fear that a failure to prevail will spawn a multi-million-dollar punitive damages verdict. The result will be to deter access to the courts and force innocent shareholders and consumers to pay the price of companies' failure to pursue valid legal claims.

Haslip articulated a list of procedural and substantive characteristics of punitive damages awards that *would* satisfy due process. But the post-*Haslip* history has left no doubt that the lower courts need help in determining those characteristics *required* by due process. Although the Constitution may not compel any particular system of punitive damages, at a constitutional minimum, due process imposes certain basic requirements that are lacking in California, as well as a host of other states. Specifically, due process demands at least: (1) an independent system of judicial review incompatible with a "passion and prejudice" standard; (2) an explanation in the record of the trial court's reasons for upholding a punitive award, as a predicate for meaningful review; and (3) comparison of punitive awards imposed in similar cases, as a safeguard against arbitrary and irrational jury action. In addition, due process cannot accommodate a $10.5 million award that is 17.5 times the amount of compensatory damages and was imposed by a jury found by the trial and appellate courts to have been inflamed by passion and prejudice. Review of this case thus provides the Court with an opportunity to resolve the conflict and confusion in the lower courts over these issues, as well as to reinforce and clarify the due process principles first enunciated in *Haslip*.

II. CALIFORNIA'S FAILURE TO PROVIDE MEANINGFUL AND ADEQUATE REVIEW OF PUNITIVE DAMAGES AWARDS CONFLICTS WITH THE PRINCIPLES SET FORTH IN *HASLIP*, AS WELL AS THE DECISIONS OF OTHER COURTS

In *Haslip*, this Court made clear that where, as in Alabama, punitive damages awards are left largely to the jury's discretion, due process demands that such awards be subject to active, independent, and rigorous judicial review. In upholding Alabama's post-verdict review system, the Court heavily relied on the fact that it includes (1) a mandatory post-verdict hearing in which the trial court independently reviews the punitive damages award pursuant to a number of "objective criteria" and "detailed substantive standards";[3] (2) the requirement that the trial court specify in writing its reasons for refusing to set aside an award of punitive damages; (3) independent review by the Alabama Supreme Court pursuant to the same objective criteria to ensure that the award is reasonable in amount and rational in light of its purposes, thereby "provid[ing] an additional check on the jury's or trial court's discretion"; and (4) evaluation by the Alabama Supreme Court to ensure that the punitive award is comparable to those awarded in similar cases. 111 S. Ct. at 1045-46. On the basis of all of those factors, the

[3] Those factors include: (a) whether there is a reasonable relationship between the punitive damages award and the harm likely to result from the defendant's conduct as well as the harm that actually occurred; (b) the degree of reprehensibility of the defendant's conduct, the duration of that conduct, the defendant's awareness, any concealment, and the existence and frequency of similar past conduct; (c) the profitability to the defendant of the wrongful conduct and the desirability of removing that profit and of having the defendant also sustain a loss; (d) the financial position of the defendant; (e) all the costs of litigation; (f) the imposition of criminal sanctions on the defendant for his conduct, these to be taken in mitigation; and (g) the existence of other civil awards against the defendant for the same conduct, these also to be taken in mitigation.

Court found that the Alabama system satisfies due process by "impos[ing] a sufficiently definite and meaningful constraint on the discretion of Alabama factfinders in awarding punitive damages." *Id.* at 1045.

Because California juries, like Alabama juries, are accorded almost limitless discretion in determining the amount of punitive damages awards, due process requires that they be subjected to a meaningful and independent system of judicial review. As demonstrated below, however, California's post-verdict review process falls far short of the rigorous system upheld in *Haslip*.[4]

A. California's Unfettered Jury Discretion

To begin with, there is no question that the California jury instructions governing punitive damages afford the same unfettered discretion to juries to determine the amount of such damages as those employed in Alabama. California juries are instructed that they may consider certain "objective" factors in assessing punitive damages, namely, the reprehensibility of the defendant's conduct,

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[4] The absence of a meaningful review process is especially harmful in a case like this, where punitive damages verdicts may infringe on First Amendment interests. Here, Boswell's constitutional right of access to the courts was at stake. See *California Motor Transport v. Trucking Unlimited*, 404 U.S. 508, 510 (1972) (right to petition under the First Amendment includes right of access to the courts); *Pacific Gas & Elec. Co. v. Bear Stearns & Co.*, 791 P.2d 587, 595 (Cal. 1990) (constitutional right to petition for redress of grievances guides the interpretation of the cause of action for malicious prosecution). Significantly, this Court has carefully limited the availability of punitive damages in cases raising First Amendment concerns. See, *e.g.*, *Electrical Workers v. Foust*, 442 U.S. 42, 52 (1979) (prohibiting punitive damages against labor unions for violation of the duty of fair representation); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 348 (1974) (limiting the availability of punitive damages in defamation suits). See also *Haslip*, 111 S. Ct. at 1054 ("punitive damages, despite their historical sanction, can violate the First Amendment") (Scalia, J., concurring).

the wealth of the defendant, and the amount of the compensatory damages. However, they are also told that the law provides no fixed standards as to the amount of such damages, but leaves the amount to the jury's discretion. See California Book of Approved Jury Instructions No. 14.71.

Moreover, the three factors employed by California's jury instruction are far too limited in number and specificity to provide a meaningful constraint on the jury's discretion. For example, "reprehensibility" is too vague and standardless a term to provide practical guidance. See *Giaccio v. Pennsylvania*, 382 U.S. 399, 404 (1966) (describing the term "reprehensible conduct" as "loose and unlimiting"). And the jury's consideration of the defendant's financial condition only adds to the arbitrary and irrational nature of punitive damages awards. Juries that are allowed to base awards on corporate wealth are likely to produce results based more on passion and prejudice than on reasoned judgment. Indeed, this Court itself emphasized in *Haslip* that "Alabama plaintiffs do not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket." 111 S. Ct. at 1045. Neither should California plaintiffs. California's rule that "the wealthier the wrongdoing defendant, the larger the award need be" (*Bertero*, 529 P.2d 608, 624 n.12) is completely contrary to the principles articulated in *Haslip*.[5]

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[5] When the defendant is a corporate enterprise, it is the profitability of the defendant's wrongful conduct rather than the defendant's net worth that should be the lodestar for determining the appropriate amount of punitive damages. As a recent Reporter's Study for the American Law Institute stated, a corporation's

> assets are irrelevant for several reasons. First, most sizeable corporations deploy their wealth in a variety of unrelated business ventures; indeed, it is often only an accident of the corporate structure that places this wealth in the hands of the particular defendant entity. Second, use of the wealth factor may impose unjustifiable sanctions on corporations which incur pro-

The third factor—that the award must bear a reasonable relationship to the compensatory award—is of little help, since juries are given no fixed ratio to apply nor even any clue as to what constitutes a reasonable ratio. California courts have upheld judgments with a ratio of compensatory damages to punitive damages ranging from a low of less than one to one (*Schomer v. Smidt*, 170 Cal. Rptr. 662, 667 (Cal. Ct. App. 1980)) to a high of one to 550,000 (*Werschkull v. United California Bank*, 149 Cal. Rptr. 829, 847 (Cal. Ct. App. 1978)). Indeed, as the Court of Appeal noted in this case, ratios as high as one to 74 have been upheld by the California Supreme Court. App., *infra*, 53a.

Accordingly, despite its incorporation of three "objective" factors, California's jury instruction effectively places no greater restraint on jury discretion than does Alabama's instruction.

B. California's Deferential Passion And Prejudice Standard of Review

Given the lack of meaningful restraints on the jury's discretion in California, due process demands the strict judicial review that Alabama, unlike California, provides. To begin with, California does not require the trial court to conduct a post-trial hearing to determine whether the punitive award is excessive. Nor does it provide independent review by either the trial or appellate court of punitive damages verdicts pursuant to detailed substan-

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portionately more instances of wrongdoing simply because of their greater *volume* of business. Finally, the actual burden of imposing a higher legal penalty on account of size cannot be borne by the formal corporate entity and will rarely be borne by the officials actually responsible; instead, the burden ultimately falls on the shareholder, customer, or worker constituencies of the firm, who often are not especially wealthy.

American Law Institute, *Enterprise Responsibility for Personal Injury, II: Approaches to Legal and Institutional Change* 254-55 (1991) (citation omitted; italics in original).

tive standards. Rather, both trial and appellate courts in California adhere—as did the courts below (App., *infra*, 50a, 53a-54a, 68a)—to an extremely deferential, essentially toothless standard of review: the "historically honored standard of reversing as excessive only those judgments which the entire record, when viewed most favorably to the judgment, indicates were rendered as the result of passion and prejudice." *Bertero*, 529 P.2d 608, 624 n.12; accord *Neal v. Farmers Ins. Exchange*, 582 P.2d 980, 990 (Cal. 1978); *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.*, 234 Cal. Rptr. 835, 850 (Cal. Ct. App. 1987), *cert. denied*, 486 U.S. 1036 (1988).[6]

This standard fails to afford due process because, unlike the Alabama system, it does not "impose[] a sufficiently definite and meaningful constraint on the discretion of [the] factfinders in awarding punitive damages." *Haslip*, 111 S. Ct. at 1045. Juries unaffected by passion and prejudice may, nevertheless, impose awards that are constitutionally excessive, *i.e.*, "grossly out of proportion to the severity of the offense" or "greater than reasonably necessary to punish and deter." *Id.* at 1045-46. Indeed, this Court itself cast doubt on the constitutionality of this standard in *Haslip* when it specifically distinguished Alabama's system from schemes that bear close resemblance to California's, "about which the Justices expressed concern" in two previous cases. *Id.* at 1045 n.10 (citations

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[6] In addition, far from providing independent appellate review of punitive damages awards, the California appellate standard requires that "[a]ll presumptions favor the correctness of the verdict" and "the trial court's determination * * * be accorded great weight." *Devlin v. Kearny Mesa AMC/Jeep/Renault, Inc.*, 202 Cal. Rptr. 204, 208 (Cal. Ct. App. 1984). See also *Downey*, 234 Cal. Rptr. at 849 (punitive damages award must be reviewed "in the light most favorable to the judgment"); *Liberty Transport, Inc. v. Harry W. Gorst Co.*, 229 Cal. App. 3d 417, 435 (1991) (appellate courts must accord "great weight" to actions of juries and trial courts with respect to punitive damages). Indeed, in this case the Court of Appeal refused to disturb the trial court's refusal to reduce the punitive damages award on the ground that it was neither "irrational [n]or arbitrary." App. *infra*, 54a.

omitted). As this Court noted, "[i]n those respective schemes an amount awarded [is] set aside or modified only if it [i]s 'manifestly and grossly excessive,' *Pezzano v. Bonneau*, 133 Vt. 88, 91, 329, A.2d 659, 661 (1974), or [is] considered excessive when 'it evinces passion, bias and prejudice on the part of the jury so as to shock the conscience,' *Bankers Life & Casualty Co. v. Crenshaw*, 484 So. 2d 254, 278 (Miss. 1985)." 111 S. Ct. at 1045 n.10.[7]

Three lower courts recently recognized the inadequacy of a "passion and prejudice" test. In *Johnson v. Hugo's Skateway, supra*, the Fourth Circuit invalidated Virginia's standard for reviewing punitive damages awards as violative of the due process principles set forth in *Haslip*. Under that standard, "a punitive damage award is deemed 'excessive' and deserving of the granting of a new trial *nisi* remittitur when 'the amount is so excessive as to shock the conscience of the court, or to create the impression that the jury was influenced by passion or prejudice.'" Slip op. at 21. According to the Fourth Circuit, "[t]here can be little doubt that the Virginia standard is far more analogous to the schemes rejected by the *Haslip* court in footnote 10 than they are to the Alabama scheme." *Ibid.* Thus the court was "left inevitably to conclude" that in order to comport with due process, Virginia's "excessiveness" standard must be replaced by the Alabama post-verdict review standards approved in *Haslip*. *Ibid.*

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[7] Even the California Supreme Court has noted that "[t]he California standard of review appears to be similar to those as to which the high court noted its concern [in *Haslip*]." *Adams v. Murakami*, 813 P.2d 1348, 1356 n.9 (Cal. 1991). Inexplicably, however, the court failed even to grant review of the issue in this case. Similarly, the court refused to grant review of two other California cases raising a procedural due process challenge to California's punitive damages scheme. *Koire v. Transamerica Occidental Life Ins. Co.*, No. B036342 (Cal. Ct. App. Sept. 20, 1991), *rev. denied*, No. S018681 (Dec. 12, 1991); *Liberty Transport, Inc. v. Harry W. Gorst Co.*, 229 Cal. App. 3d 417 (1991), *rev. denied*, No. S021190 (July 10, 1991).

Similarly, in *Fleming Landfill, Inc. v. Garnes*, *supra*, the Supreme Court of Appeals of West Virginia held that West Virginia's passion and prejudice standard of review was inadequate under *Haslip*, and accordingly replaced it with a system under which awards are reviewed pursuant to detailed substantive standards. Slip op. at 24-26. And in *Gamble v. Stevenson*, *supra*, the Supreme Court of South Carolina changed its deferential judicial review process to conform to the procedures approved in *Haslip*. See 406 S.E.2d at 354.[8] See also *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109-110 (4th Cir. 1991) (requiring detailed jury instructions to compensate for overly deferential standard of federal court review of punitive damages awards).

Review of this case is necessary to resolve the conflict between the post-*Haslip* decisions striking down overly deferential review standards and the decision in this case upholding a standard that is their functional equivalent.[9]

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[8] It is clear that, up until *Gamble*, South Carolina courts reviewed punitive damages awards under a passion and prejudice/"grossly excessive" standard. See *Freeman v. A. & M. Mobile Home Sales, Inc.*, 359 S.E.2d 532, 535 (S.C. Ct. App. 1987) (citing cases).

[9] The fact that California reviewing courts purport to evaluate the same three "objective" factors considered by California juries (see *Adams*, 813 P.2d at 1350-51; *Neal*, 582 P.2d at 990; *Liberty Transport, Inc.*, 229 Cal. App. 3d at 436) in no way distinguishes the California scheme from the other deferential review schemes found to be inconsistent with *Haslip*. As explained earlier, ritual invocation of these meaningless criteria is a far cry from the independent application by Alabama courts of seven substantive factors designed to test the reasonableness of punitive damages verdicts. More importantly, they do not serve as independent standards for reviewing courts, but merely as guidelines for determining whether a judgment is the result of passion and prejudice. As in the old Virginia, West Virginia, and South Carolina schemes, review of the juries' exercise of discretion in California ultimately amounts to a wholly subjective, gut-level test under which punitive damages awards are reversed only if they are grossly excessive, are influenced by passion or prejudice, or shock the conscience.

C. California's Failure To Require Trial Courts To Make Findings In The Record

In addition to its lack of independent judicial review pursuant to detailed substantive standards, California's review process is constitutionally inadequate insofar as it fails to require trial courts to express reasons in the record for refusing to reverse or reduce a punitive damages verdict. To the contrary, California requires a trial court to explain its reasoning only if it grants a post-trial motion based on excessive damages. See *Neal*, 582 P.2d at 992; *Gerard v. Ross*, 251 Cal. Rptr. 604, 609-10 (Cal. Ct. App. 1988); *Las Palmas Associates v. Las Palmas Center Associates*, No. C575906, slip op. at 54 n.8 (Cal. Ct. App. Nov. 5, 1991) ("[u]nlike in Alabama, California law does not mandate that the trial court state on the record why it refused to interfere with the award").[10]

California appellate courts are thus denied essential information for performing a meaningful and adequate review of the trial court's decision. In fact, it is difficult to imagine how a California appellate court could conduct the searching review mandated by *Haslip* without this vital information. In upholding Alabama's punitive damages scheme, this Court strongly emphasized that the Supreme Court of Alabama requires trial judges to conduct an independent review of the jury's award and " 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so, on grounds of ex-

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[10] In this case, far from explaining its reasons for upholding the jury's $10.5 million award, the trial court merely stated its conclusion that "the punitive damages awarded by the jury as to each Plaintiff bear a reasonable relationship to the compensatory damages awarded as reduced by the Court, and that said punitive damages are neither excessive nor the product of passion or prejudice." App., *infra*, 68a. The trial court did not even attempt to explain why the jury's passion and prejudice required a reduction of the jury's compensatory damages award, but not its punitive award. Accordingly, it was impossible for the Court of Appeal to engage in rational review of the trial court's decision.

cessiveness of the damages.'" 111 S. Ct. at 1044 (quoting *Hammond v. City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986)). By failing to provide this essential safeguard, California's punitive damages procedures fall considerably short of the guarantee of due process.

California's failure to require trial courts to make specific findings in the record particularly warrants review by this Court in light of several contrary decisions by other lower courts. These courts have found summary denials similar to the trial court's in this case to be inconsistent with *Haslip*, and have accordingly remanded to the trial courts for an explanation of their reasons for upholding the award. See *American Employers Ins.*, 931 F.2d at 1458; *Robertson Oil Co., Inc.*, 930 F.2d at 1347; *Gamble*, 406 S.E.2d at 354 (changing South Carolina procedures to require trial courts to set forth findings on the record). The exercise of certiorari is necessary to resolve this conflict over the trial court procedures that due process requires.

D. California's Prohibition Against Comparing Awards In Similar Cases

Finally, California's procedures for reviewing punitive damages awards are insufficient insofar as they preclude appellate courts from considering damages awards rendered in similar cases. In California, "comparison of the amount awarded with other awards in other cases is not a valid consideration." *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 388 (Cal. Ct. App. 1981). According to the California Supreme Court, "[f]or a reviewing court to upset a jury's factual determination on the basis of what other juries awarded to other plaintiffs for other injuries in other cases based upon different evidence would constitute a serious invasion into the realm of fact-finding." *Bertero*, 529 P.2d at 624 n.12; see also *Bigboy v. County of San Diego*, 201 Cal. Rptr. 226, 231 (Cal. Ct. App. 1984).

In finding Alabama's system of judicial review constitutionally adequate, this Court specifically relied on

the fact that, in reviewing punitive awards, the Alabama Supreme Court "first undertakes a comparative analysis [of other awards]." *Haslip*, 111 S. Ct. at 1045. If the Alabama Supreme Court determines that the award is disproportionate to previous awards for similar misconduct, the award is reduced on that basis. See *Aetna Life Ins. Co. v. Lavoie*, 505 So. 2d 1050, 1053 (Ala. 1987). By ensuring that like cases are treated alike, this approach helps to achieve a rational, predictable, and equitable system of punitive damages.

By contrast, California's prohibition against any comparative analysis invites wildly disparate and unpredictable punitive damages awards for similar conduct, allowing juries to award whatever amount whim, caprice, or clever advocacy may suggest. Such an arbitrary system is fundamentally unfair and produces the type of "extreme results that jar one's constitutional sensibilities." *Haslip*, 111 S. Ct. at 1043.[11]

In sum, *Haslip* makes clear that only a strict system of judicial review provides sufficient safeguards against overly punitive, potentially devastating punitive damages awards. Subjective standards such as those employed by California trial and appellate courts—that essentially defer to the jury's determination unless that decision produces outright shock—fail to provide adequate protection

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[11] A cursory review of other California punitive damages awards would have clearly demonstrated the severe inequity of the award in this case. For example, in *Grimshaw v. Ford Motor Co., supra*, Ford was required to pay only $3.5 million in punitive damages, even though the plaintiff was awarded $2.5 million in compensatory damages for permanently disfiguring burns caused by Ford's "conscious and callous disregard of public safety," *i.e.*, its failure to correct its defective Pinto fuel tank design. 174 Cal. Rptr. at 388. Surely if Ford's egregious conduct warranted only a $3.5 million award, the courts below were totally unjustified in affirming a $10.5 million award for the mere publication and filing of a lawsuit that in no way threatened public health or safety.

against arbitrary and inequitable awards.[12] Only review by this Court can bring California's procedures into conformity with constitutional due process requirements, and resolve the multiplicity of conflicting decisions by the lower courts.

That the California Supreme Court has elected to ignore this important issue is demonstrated by its refusal to review not only this case, but two other cases raising challenges to California's punitive damages procedures in the wake of *Haslip*. See *Koire v. Transamerica Occidental Life Ins. Co.*, No. B036342 (Cal. Ct. App. Sept. 20, 1991), *rev. denied*, No. S018681 (Dec. 12, 1991); *Liberty Transport, Inc. v. Harry W. Gorst Co.*, 229 Cal. App. 3d 417 (1991), *rev. denied*, No. S021190 (July 10, 1991). The California Court has declined such review notwithstanding this Court's post-*Haslip* grant of certiorari in every case presenting a due process challenge to California's procedures and the remand of each of those cases to a California Court of Appeal for reconsideration in light of *Haslip*.[13] Indeed, one of the cases that the California

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[12] The defects in California's post-verdict review process are compounded by its system of review in which appellate courts revise, reinstate, modify and affirm multi-million-dollar punitive damages awards in "unpublished" opinions. See, *e.g.*, *Eaton Corp. v. The PKL Cos.*, No. B010958 (Cal. Ct. App. July 18, 1988), *cert. denied*, 109 S. Ct. 1933 (1989) ($15 million punitive award affirmed in an unpublished opinion); *Metromedia, Inc. v. April Enterprises, Inc.*, No. B022890 (Cal. Ct. App. June 9, 1988), *cert. denied*, 109 S. Ct. 3242 (1989) ($14 million punitive award affirmed in an unpublished opinion). This practice shields from public scrutiny the capricious effects of the punitive damages system and fosters an *ad hoc*, inequitable and wholly unpredictable system of punitive damages. Such an approach is particularly illegitimate after this Court's recognition in *Haslip* of the importance of meaningful review of punitive damages awards. Yet, as this case and others (see, *e.g.*, *Koire v. Transamerica Occidental Life Ins. Co.*, No. B036342 (Cal. Ct. App. Sept. 20, 1991)) illustrate, the California courts have continued to adhere to this secretive practice.

[13] See *Church of Scientology v. Wollersheim*, 111 S. Ct. 1298 (1991); *International Society for Krishna Consciousness v. George*,

Supreme Court refused to review (*Koire*) was among those cases remanded by this Court. Thus, it is abundantly clear that California's punitive damages procedures will not be brought into conformity with the Constitution unless this Court acts.

III. THE $10.5 MILLION PUNITIVE DAMAGES AWARD IN THIS CASE VIOLATES DUE PROCESS BECAUSE IT IS THE PRODUCT OF PASSION AND PREJUDICE AND IS CONSTITUTIONALLY EXCESSIVE

A. The Trial Court Found That The Jury Was Infected By Passion And Prejudice

In *Haslip*, this Court noted that there is no "dispute[] that a jury award may not be upheld if it was the product of bias or passion." 111 S. Ct. at 1038 (quoting *Browning Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989)). Similarly, Justice Kennedy recognized that "[a] verdict returned by a biased or prejudiced jury no doubt violates due process, and the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case." 111 S. Ct. at 1055 (concurring opinion).

In no other case could it be so clear that the jury was influenced by passion and prejudice. Not only do the record and huge award itself overwhelmingly demonstrate that the jury was motivated by sympathy for local farmers,[14] but the trial and appellate courts *themselves*

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111 S. Ct. 1299 (1991); *Pacific Lighting Corp. v. MGW, Inc.*, 111 S. Ct. 1299 (1991); *AMCA Int'l Finance Co. v. Hilgedick*, 111 S. Ct. 1614 (1991); *Transamerica Occidental Life Ins. Co. v. Koire*, 111 S. Ct. 2253 (1991).

[14] As noted earlier, see pages 4-5, *supra*, Respondents' counsel repeatedly attempted to portray Boswell as an evil corporation bent on destroying those less powerful than itself. Toward that end, Respondents' counsel compared Boswell's management to Nazi leaders (Tr. 3414:15-16), Ivan Boesky (Tr. 4626-27), and dictators of "communist countries."

found that the jury was so inflamed. In the trial court's own words, the jury suffered from passion and prejudice "engendered by the 'David vs. Goliath' character of the case." App., *infra*, 68a.

And yet, notwithstanding its conclusion that the jury's passion and prejudice resulted in compensatory damages that were *five* times the amount that represented "the top of the range of fair and reasonable compensatory damages" and therefore required a reduction of those damages by 80 percent, the trial court inexplicably sustained the staggering $10.5 million punitive damages award without any reduction.

Just as inexplicably, the Court of Appeal upheld that decision. According to the Court of Appeal, the trial court's affirmance of the punitive damages award was not inconsistent with its reduction of the compensatory damages award because "[t]he punitive damage proceeding was bifurcated" and "[s]everal days passed" between the award of compensatory and punitive damages. *Id.* at 54a. The court failed to explain, however, why the jury's passion and prejudice against Boswell somehow disappeared during the six days that elapsed between the jury's awards of compensatory and punitive damages. It also failed to reconcile that conclusion with its determination that the jury's passion and prejudice "was evidenced throughout the transcript." *Id.* at 63a. If the jury was impermissibly swayed by passion and prejudice in its award of compensatory damages, it is simply inconceivable that it was not similarly biased in its award of punitive damages. The Court of Appeal's failure to reverse, or at least to reduce, a $10.5 million punitive damages award that was so clearly driven by the same impermissible prejudice plainly violated Boswell's due process rights.

B. The Punitive Damages Award Has No Reasonable Relationship To The Amount Of Compensatory Damages And Is Wholly Disproportionate To The Severity Of The Offense

This Court made clear in *Haslip* for the first time that the amount of a particular punitive damages award may be so excessive as to offend due process. Specifically, this Court held that a punitive damages award exceeds constitutionally permissible limits if it "is greater than reasonably necessary to punish and deter." 111 S. Ct. at 1046. Relevant to that determination are whether the punitive damages "have some understandable relationship to compensatory damages," whether they are "grossly out of proportion to the severity of the offense," and whether they merely reflect the plaintiff's "windfall" in having the "good fortune" to sue a defendant "with a deep pocket." *Id.* at 1045. Applying these principles to the facts of this case, there is no question that the $10.5 million award is constitutionally excessive.

To begin with, the $10.5 million award has no coherent relationship to the amount of compensatory damages assessed against Boswell. The punitive damages here are 17.5 times the compensatory damages of $600,000. If the $840,000 punitive damages award in *Haslip*, which was approximately four times the compensatory award, was "close to the line" (*id.* at 1046), the $10.5 *million* award imposed in this case—more than 17 times the compensatory award—surely "crossed the line into the area of constitutional impropriety" (*ibid.*). While a larger ratio may be appropriate in some cases involving an extremely small amount of compensatory damages, here the amount of compensatory damages is three times that involved in *Haslip*.

Moreover, the 17.5 to 1 ratio is not even the ratio chosen by the jury. Originally, the jury established a relationship between punitive and compensatory damages of 3.5 to 1. The 17.5 to 1 ratio that existed after the compensa-

tory award was reduced nullified the jury's determination on the issue of what proportion was fair. To permit a punitive award of this size to be sustained when it bore no relationship to the proportion imposed by the jury violates the constitutional guarantee of fundamental fairness.

The $10.5 million punitive damages award is also constitutionally excessive because it is "grossly out of proportion to the severity of the offense." *Haslip*, 111 S. Ct. at 1045. Boswell's behavior in no way jeopardized the public health or safety. Nor did it cause Respondents any physical or even economic harm. In this case, the offensive conduct consisted of Boswell's filing a lawsuit, on the advice of counsel and pursuant to its constitutional right of free access to the courts, and notifying others of that action. It did so in response to an advertisement that it was advised by counsel was libelous *per se* and that portrayed Boswell as a corporate price-fixer. At the very worst, Boswell is guilty merely of unreasonably believing that it had probable cause to institute a libel action against Respondents.[15]

This is not reprehensible action, much less the type of outrageous conduct necessary to sustain an award that would confiscate approximately 10 percent of Boswell's net assets. See App., *infra*, 55a. There is accordingly no question that the jury did not base its award on the nature of Boswell's conduct, as due process requires, but rather on the inflammatory rhetoric directed at Boswell and on its "deep pocket" status. Significantly, neither the trial court nor the Court of Appeal ever attempted to explain why Boswell's conduct justified a punitive award as high as $10.5 million.

Such an extraordinary penalty is particularly inappropriate where, as here, important First Amendment inter-

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[15] Indeed, Boswell's libel action was rejected under an approach later discarded by this Court in *Milkovich*, 110 S. Ct. at 2706-07.

ests are at stake. As Justice O'Connor has explained, punitive damages may be employed "to target unpopular defendants [and] penalize unorthodox or controversial views"—the very objects of the First Amendment's protections. *Haslip*, 111 S. Ct. at 1056 (dissenting opinion); see also *Foust*, 442 U.S. at 50 n.14 ("it cannot be ignored that punitive damages may be employed to punish unpopular defendants").[16]

Here, the trial court itself found that the jury was prejudiced against Boswell, who was portrayed as a corporate "Goliath" against helpless local farmers. Given the absence of any other rational explanation for the shocking size of the punitive award, it surely represents nothing more than the jury's attempt to punish Petitioner for exercising its constitutionally guaranteed right of access to the courts.

The enormous $10.5 million punitive damages award in this case "crossed the line into the area of constitutional impropriety." *Haslip*, 111 S. Ct. at 1046. The pandemonium existing in the lower courts regarding the application of *Haslip*, as well as the particularly outrageous penalty imposed below, warrants this Court's review.

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[16] When First Amendment interests are jeopardized, special care should be taken not only with respect to the procedures used to render an award of punitive damages, see page 14 n.4 *supra*, but with respect to reviewing the substance of such an award.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

WILLIAM M. BURKE
Counsel of Record

THOMAS S. MARTIN
WENDY E. ACKERMAN
SHEARMAN & STERLING
801 Pennsylvania Ave., N.W.
Suite 900
Washington, D.C. 20004
(202) 508-8000

APPENDICES

APPENDIX A

IN THE COURT OF APPEAL
OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT

No. F011230

(Super. Ct. No. 179027)

KEN WEGIS *et al.*,
Cross-Complainants, Respondents and Appellants.

v.

J. G. BOSWELL COMPANY,
Cross-Defendant, Appellant and Respondent.

OPINION

[Dated Jun. 14, 1991]

APPEAL from a judgment of the Superior Court of Kern County, Marvin E. Ferguson and Len M. McGillivray, Judges.*

Shearman & Sterling, William M. Burke, Richard B. Kendall, Charles M. Grant, Natalie B. Rea, Bianco, Means & McBurnie and Harvey H. Means for Cross-Defendant, Appellant and Respondent.

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* Judge Ferguson, retired judge of the superior court sitting under assignment by the Chairperson of the Judicial Council, was the trial judge; Judge McGillivray presided at posttrial motions.

Klein, Wegis, DeNatale, Hall, Goldner & Muir, Gerald H.B. Kane, Jr., and Ralph B. Wegis for Cross-Complainants, Respondents and Appellants.

INTRODUCTION

This appeal arises from protracted litigation between J. G. Boswell Company (Boswell) and Family Farmers for Proposition 9, Ken Wegis, Jack and Jeff Thomson (Family Farmers).* During the political campaign in 1982 over the peripheral canal initiative, Proposition 9, Family Farmers for Proposition 9 placed an advertisement in the Bakersfield Californian and the Hanford Sentinel that was critical of Boswell's involvement against Proposition 9. Family Farmers were in favor of Proposition 9.

Boswell considered the advertisement libelous and filed a complaint for damages on May 14, 1982. The complaint named Family Farmers, Ken Wegis and Does 1 through 1,000. Jack Thomson and his son Jeff were later served. Wegis and the two Thomsons were the only individual defendants in the libel action. Family Farmers filed a cross-complaint for abuse of process and interference with constitutional rights.

Jeff Thomson successfully brought a motion for summary judgment against Boswell on March 4, 1983. In June of 1984, summary judgment was entered on behalf of Ken Wegis and Jack Thomson. On June 2, 1986, this court affirmed entry of the summary judgments.

Jeff Thomson, on June 3, 1985, and Ken Wegis and Jack Thomson, on November 17, 1986, filed first amended cross-complaints. Each added a cause of action for malicious prosecution.

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* The political group known as Family Farmers was not a party to the cross-complaint. The parties have continued to refer to cross-complainants as Family Farmers. To maintain consistency, we will refer to cross-complainants as Family Farmers.

A jury trial on the cross-complaint commenced on June 13, 1988. Proceedings for punitive damages were bifurcated from the liability phase of trial. The liability stage of trial lasted approximately one month and ended with judgment in favor of Family Farmers on all three causes of action. The three cross-complainants were awarded $1 million each in damages. The trial on punitive damages began on July 12, 1988, and ended two days later. The jury awarded $3.5 million to each of the three cross-complaints for a total punitive damage award of $10.5 million. Boswell appeals both the award of compensatory and the award of punitive damages.

The trial was conducted before Judge Marvin Ferguson who was retired at the time. Because Judge Ferguson had health problems, motions for judgment notwithstanding the verdict and for new trial were brought before Judge McGillivray. Judge McGillivray read the entire trial transcript and denied the motion for judgment notwithstanding the verdict but conditionally granted the motion for new trial unless the cross-complainants accepted a remittitur of compensatory damages. It ordered that cross-complaints accept $200,000 each in compensatory damages. Judge McGillivray further found there was a reasonable relationship between the compensatory damages as reduced by the court and the punitive damage awards and declined to reduce the awards finding they were neither excessive nor the product of passion or prejudice. Family Farmers cross-appealed from Judge McGillivray's order of remittitur.

FACTS

A. *The peripheral canal initiative campaign.*

The campaign over Proposition 9 on the June 1982 ballot, the peripheral canal initiative, was heated. Boswell opposed Proposition 9 and contributed $1.4 million to the campaign against the initiative. Boswell supported in-

stead a proposal called the "Through Delta Facility" which it believed was a better way to meet the water needs of central and southern California. Family Farmers supported Proposition 9 and were actively involved in the yes campaign. Ken Wegis, Jack Thomson and Jeff Thomson, respondents and cross-appellants, were members of or contributors to Family Farmers. Family Farmers for Proposition 9 was a political association of small farmers in the Kern County area.

Family Farmers for Proposition 9 was formed with the assistance of Jack Thomson and Ken Wegis under the auspices of a larger umbrella group known as Citizens for Water.

B. *The advertisement.*

On May 10, 1982, Family Farmers for Proposition 9 published an advertisement in the Bakersfield Californian and the Hanford Sentinel directed specifically against Boswell and another agri-business corporatio, Salyer. The advertisement charged that Boswell was "accountable to no one" and that it had an "UNLIMITED WAR CHEST." The ad claimed Boswell was using this money "to defeat Proposition 9 and sabotage the construction of the Peripheral Canal." The advertisement started by asking the reader to consider why Boswell and Salyer were trying to cut off water supplies to central and southern California. The advertisement then questioned "WHY?," responding with discussions under the following subtitles: "TO ELIMINATE ENVIRONMENTAL PROTECTIONS?," "TO FREEZE OUT COMPETITION?," "TO DOMINATE CALIFORNIA WATER POLICY?," "TO AVOID PAYING THEIR SHARE?" The same advertisement was later turned into placards and placed on tractors and automobiles during the tractorcade held in Los Angeles to rally support for Proposition 9.

Boswell was concerned that the advertisement was effective and that it would stimulate pro-canal votes and contributions. Boswell's counsel, John Sterling, unsuccessfully attempted to get Salyer Land Company involved in litigation attacking Family Farmers. Everett Salyer, however, did not think it was a good idea to bring a lawsuit. He also did not think the ad was libelous.

Sterling then met with J. G. Boswell, chairman of the board, and Jim Fisher who was president of Boswell. The meeting occurred on May 11, 1982. Boswell and Fisher were both upset about the advertisement, considering it libelous. Fisher expressed concern over the damage it would cause to Boswell's reputation in the community and the effect it would have on Boswell's employees.

Sterling opined that the advertisement was libelous in that it charged Boswell and Salyer with the crime of price fixing. Sterling acknowledged he was not an experienced libel attorney and decided to seek the advice of more experienced counsel. J. G. Boswell felt the ad was effective and wanted it stopped. He testified that Fisher and Sterling "understood bloody well" he was upset about the ad. Boswell further stated it was up to Fisher and Sterling to go out and to do whatever they had to do about the ad.

Sterling then consulted with William Chertok, an attorney with considerable trial experience and knowledge of libel law. Sterling and Chertok carefully reviewed the advertisement and Chertok asked Sterling pertinent questions. Sterling explained to Chertok the political context of the publication and asked whether Boswell could seek judicial redress for harm inflicted upon it by the advertisement. Chertok agreed to do the necessary research to determine if the advertisement could give rise to any actionable claim.

Chertok then directed attorneys and paralegals in his firm to thoroughly research the issues surrounding libel

per se. He ordered that they research injunction law, prior restraint law, defamation law, and the Cartwright Act. He directed research of the Elections Code to see if that code created any causes of action. He also had research conducted into the area of unfair competition. Two law clerks in Chertok's firm, supervised by an attorney who later became a superior court judge, spent hours researching the law. In all, Chertok's law firm spent more than 60 hours researching the matter before suit was filed. Written memoranda evidencing the research, however, were lost after Chertok changed law firms. Conspicuously absent in Chertok's order of research was any inquiry into whether or not the statements set forth in the advertisement were constitutionally protected opinions.

After analyzing the law and the facts, on May 13, 1982, Chertok advised Sterling that Boswell had a valid cause of action for libel per se. He further concluded that Boswell had no cause of action for unfair competition or for Elections Code violations. Chertok advised that a request for a retraction or a correction would be necessary to preserve a claim for libel. Although Sterling reserved final decision on whether to proceed with a lawsuit, he advised Chertok to draft a complaint.

On May 14, 1984, Chertok and Sterling met again. After reviewing the proposed complaint and discussing it was Chertok, Sterling consulted Fisher. Later that day, Sterling authorized Chertok to commence an action on behalf of Boswell against Family Farmers and Ken Wegis for libel per se.

The suit named as defendants Family Farmers, Ken Wegis, and 1,000 Does. It sought $1 million in compensatory damages and $1.5 million in punitive damages from each defendant. Jack and Jeff Thomson were substituted for two Does shortly afterward. In the suit, Boswell was most concerned with a sentence in the ad that allegedly accused Boswell of engaging with Salyer

in a criminal conspiracy to fix prices in violation of the Cartwright Anti-Trust Act. Chertok also sent letters to the Bakersfield California and the Hanford Sentinel, requesting a retraction and informing them of Boswell's pending libel action. The Bakersfield Californian ultimately printed a clarification.

Boswell also sent the first page of the complaint naming the 1,000 Does, along with a letter informing of the nature of the lawsuit and the fact an attempt would be made to take out further ads, to all of the newspapers in the state that Boswell felt might be approached to run the ad.[1] Family Farmers maintained that the newspapers and other small farmers were put on notice that support for the peripheral canal could subject them to inclusion in the pending lawsuit.

Family Farmers had hoped the May 10 ad would generate contributions to the pro-9 campaign. Once the libel suit was filed, however, contributions evaporated. No other funds were raised and plans for future ads were abandoned. Family Farmers has maintained throughout the lawsuit that deprived of its financial support and its political base, the pro-canal forces were easily defeated at the polls.

Ken Wegis testified that contributions dried up because no one wanted to be named as one of the Doe defendants. Jeff Thomson corroborated this testimony and expalined he had been nearly shunned by his friends over the next several years for having brought down the wrath of Boswell on the communiyt.

Boswell maintained that respondents remained active in Kern County water politics. Boswell contends they con-

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[1] Some of the newspapers contacted included Visalia Newspapers, Inc., McClatchy newspapers, the aSn Diego Transcript, Twin Coast Newspapers, the Copley Press, the Herald-Examiner, Stockton newspapers, Times Mirror, the San Francisco Examiner, Tulare newspapers, and Chronicle Publishing.

tinued their activities and efforts in support of Proposition 9 and continued to give public speeches and to make campaign contributions to candidates who supported Proposition 9.

C. *This court's prior decision.*

After the trial court granted summary judgment on the libel complaint, Boswell appealed contending there were triable issues of fact over whether or not the advertisement constituted fact or opinion and whether or not the defamatory statements were made with actual malice. This court disagreed and affirmed the trial court's judgment. At the very beginning of the discussion in our prior opinion, we noted tha the apparent purpose of the advertisement was to discredit atnd call into question the joint involvement of Boswell and Salyer with the campaign to defeat the peripheral canal. We noted the advertisement was published "during the last days of a heated political campaign."

Our opinion then went to the most objectionable part of the advertisement from Boswell's standpoint. The advertisement speculated that Salyer and Boswell wanted to freeze out competition because water deliveries would be delayed if Proposition 9 was defeated. The objectionable paragraph went on the state that smaller farmers do not have the same water resources, and Boswell and Salyer understand this. The ad then stated: "If the small farms go out of business, Boswell and Salyer will be able to totally dominate California agriculture—setting prices where they want them."

We noted that the bulk of the advertisement, though it was unflattering and possibly derogtaory, was not defamatory without resort to inducement, innuendo or other extrinsic facts.

We then turned our analysis to the alleged criminal conspiracy to violate the Cartwright Act, a violation of

Californnia's antit-trust law. We found that the challenged advertisement encompassed on'y the free use of epithets, hyperbole or fiery rhetoric which is characteristic of political communications within the context of a political battle. We also found that though a conspiracy to create a trust is violative of hte Cartwright Act and potentially criminal, we were not persuaded that the challenged advertisement fell into that status. Looking to the advertisement as a whole, we concluded that Family Farmers were merely speculating about Boswell's motivation. From th elanguage of the advertisement, we could not construe an accusation that Boswell was engaged in a present conspiracy. We further found that the reader could not be misled into accepting Family Farmers' clear speculation about Boswell's motivation as a factual accusation that Boswell was actually guilty of a criminal conspiracy. This was particularly true within the context of the advertisement because the acts identified as imputing criminal conspiracy had not yet been completed.

We concluded that the challenged statements were simply hypothetical speculation concerning Boswell's motivation in opposing passage of the peripheral canal initiative. We held there was no undisclosed defamatory fact which would render Family Farmers' opinion legally actionable.

Lastly, we stated the trial court properly determined as a matter of law that the challenged statement was opinion and it was constitutionally protected. This entitled defendants to summary judgment. We affirmed the judgment and awarded defendants their costs on appeal.

D. *Trial on cross-complaint.*

At the trial in the instant action, Ken Wegis testified he was on vacation in Oregon when the lawsuit was filed. He learned of the suit from his son. He was shocked and came home immediately. He was concerned because there were three families, including his own, who were depend-

ent-on income from the farm. The prospect of having to pay over $2 million in damages to Boswell would be financially disastrous. After negotiations, his insurance company agreed to defend the lawsuit though it informed him it would not be responsible for any damages to be paid to Boswell. The insurance company dropped Ken Wegis as an insured and he had to obtain insurance from another company. Wegis was not only concerned that he would not obtain crop financing as a result of the potential liability to Boswell, he was concerned that in the event of a judgment for Boswell he would have to liquidate his entire ranching and farming operations. He also testified he greatly reduced his political activities as a result of the lawsuit.

Jack Thomson testified that the lawsuit was disastrous. He feared his family would lose everything. He called a family gathering to discuss the lawsuit and its potential effect on the family. The Thomsons' insurance company also only agreed to defend them but not to pay for any losses resulting from the litigation. Jack Thomson's and Jeff Thomson's insurance company cancelled some of their insurance policies. Jack Thomson's insurer suggested he not get involved in any more political campaigns.

The insurance company specifically explained to Jack Thomson that if he became involved in political activities, he would only receive 50 percent coverage for potential liability. If Thomson removed himself from that type of exposure, the insurance company would give him 100 percent coverage. The Thomsons also feared the banks would not renew annual crop financing because of the threat posed by the lawsuit. These fears lasted through the duration of the litigation. Jack Thomson testified that if he had not been able to find another source of financing, he would have had to shut down his entire farming operation.

Family Farmers argued that the prospect of losing their farms was particularly painful to them because

their farms had been in their families for generations. They believed the pain inflicted on them was made even more acute by the fact that they lost the peripheral canal election.

Jeff Thomson also testified that because of the lawsuit he concluded he would have to exclude himself from future political activities. Ken Wegis and Jack Thomson reached the same conclusion. The anxiety from the lawsuit went on for four and a half years. Though it abated somewhat when the trial court granted summary judgment against Boswell, it started all over again throughout Boswell's appeal from that judgment. Jeff Thomson testified that the effect of the lawsuit was something he carried around with him all the time. He testified that though he tried to conduct his life in an ordinary way, the lawsuit was a constantly gnawing thing.

The families were also affected by the stressful effects of being sued for such large sums of money. Each of the families felt anxiety about the future and shock that all their hard work could be destroyed by the lawsuit. Mrs. Wegis testified that her husband's life revolved a lot around farming. She had been worried about him throughout the course of the lawsuit. She testified he was not sleeping well and it had been a terrible time for them and for their whole family. She testified they were all in a state of shock and depressed.

During trial, Boswell raised the affirmative defense that it had relied on the advice of counsel. The jury was instructed that this was a defense to the malicious prosecution action brought by Family Farmers against Boswell. The jury found Boswell liable on all three causes of action and set damages in the amount of $1 million for each of the cross-complainants. The jury affirmatively answered interrogatories indicating it had found by clear and convincing evidence that Boswell's conduct was malicious, oppressive or fraudulent as to all claims.

After the first phase of trial, cross-complainants were permitted discovery into Boswell's assets. Then the second phase of the bifurcated proceedings relating solely to the issue of punitive damages commenced. Boswell urged that the worth of its net assets was $232 million as reflected in records carrying those assets at original cost. This included extensive land and water rights acquired in the early 1900's. Boswell did not calculate the current value of the land and water assets. Family Farmers urged that the evidence established a fair market value of such assets in excess of $800 million.

The jury awarded punitive damages in the amount of $3.5 million for each cross-complainant for a total punitive damage award of $10.5 million. The trial court awarded a remittitur reducing the compensatory damage award of reach cross-complainant from $1 million to $200,000. Though the trial court found the award of compensatory damages was excessive because of the jury's passion and prejudice against Boswell engendered by a "David versus Goliath" character of the case, it found that the punitive damage award was not excessive and not the product of such passion or prejudice.

DISCUSSION

I.

MALICIOUS PROSECUTION.

A. *Did Boswell have probable cause to commence its libel action?*

Boswell contends that its libel claim was not totally and completely devoid of merit. Boswell argues that the facts underlying the libel complaint are not in dispute. The only facts to be considered on the issue of whether or not it had probable cause to commence its action were those facts known to Boswell at the time the prior action was

commenced. The libel claim, according to Boswell, was Family Farmers. Boswell contends that the trial court in the instant action erroneously submitted the issue of probable cause to the jury with an instruction defining probable cause under a subjective standard.

Under this subsection, Boswell has raised two different issues. The first issue is whether or not the trial court improperly delegated its responsibility to determine probable cause to the jury and whether the instruction to the jury was erroneous. The second issue is whether Boswell had probable cause to bring the libel action against Family Farmers. This issue in turn can only be resolved by an analysis of whether the statements in the advertisement were in fact or opinion and, if opinion was it protected or actionable.

1. *Did the trial court err in delegating to the jury the determination of probable cause? Was the instruction erroneous?*

To establish a claim for malicious prosecution a plaintiff must prove " 'that the prior action (1) was commenced by or at the direction of the defendant and was pursued to a legal termination in his, plaintiff's favor [citations]; (2) was brought without probable cause [citations]; and (3) was initiated with malice [citations]. [Citations.]' " (*Shelden Appel Co.* v. *Albert & Oliker* (1989) 47 Cal.3d 863, 871-872.)

> ". . . [T]he existence of absence of probable cause has traditionally been viewed as a question of law to be determined by the court, rather than a question of fact for the jury. . . . '[W]hether the defendant had or had not probable cause for instituting the prosecution is always a matter of law to be determined by the court. If the facts upon which the defendant acted are undisputed, the court, according as it shall be of the opinion that they constituted probable cause or not, either will order a nonsuit (or direct a verdict for the defendant), or it will submit the other issues

> to the jury; but whether admitted or disputed, the question is still one of law to be determined by the court from the facts established in the case.' [Citations.]" (47 Cal.3d at p. 875.)

The only issues to be determined by the jury are the facts, when controverted, upon which the defendant acted in bringing the prior action. (47 Cal.3d at p. 877.) If those facts are undisputed, the probable cause issue is properly determined by the court. *Id.* at p. 881.) The instruction of which Boswell complains is based upon BAJI No. 7.33 and was given in the following form:

> "To constitute want of probable cause for the initiation or maintenance of a civil proceeding against the plaintiffs in this case, the evidence must establish that: The defendant, when it filed its lawsuit, did not have a good faith belief that it had a cause of action against plaintiffs for libel.
>
> "If you find that such facts are true, you must find that there was not probable cause for the initiation or maintenance of the civil proceeding against plaintiffs.
>
> "If you find from all the evidence that the foregoing facts are not true, you must find that there was probable cause for the initiation or maintenance of the civil proceeding against plaintiffs."

The sole issue therefore presented to the jury for determination was whether Boswell had "a good faith belief that it had a cause of action against plaintiffs for libel." Thus, technically, the court did not generally put to the jury the issue of probable cause but rather submitted for decision only what it believed to be a proper underlying factual issue. Implicit in the instruction is the conclusion that but for that one factual aspect the court had resolved all other issues pertaining to probable cause. However, technical implicities do not control our determination of the issue, for we conclude, as did the

court in *Sheldon Appel*, that "there were no disputed questions of fact relevant to probable cause to be submitted to the jury in this case, and for that reason it is clear that the trial court erred in submitting the issue to the jury in any form." (47 Cal.3d at p. 876.)

Boswell's subjective belief (good faith or not) in the merits of its case is not relevant to the issue of probable cause. The relevance of defendant's subjective belief to probable cause is restricted. "[T]he 'belief' in question relate[s] to the defendant's belief in, or knowledge of, a *given state of facts*, and not to the defendant's belief in, or evaluation of, *the legal merits of the claim*." (47 Cal.3d at p. 879.)

The only facts to be considered are the facts known to the defendant and upon which defendant acted at the time the prior action was commenced. (47 Cal.3d at p. 875.) In the present case, Boswell's libel claim was entirely based on Family Farmers' advertisement, the content and context of which are disputed. Where the facts known by the [defendant] are not in dispute, the probable cause is properly determined by the trial court. Thus, the submission to the jury of any issue as to probable cause was erroneous. This error, however, does not require reversal or remand. The issue being one of law, this court is in as good a position as the trial court to resolve the legal issue presented. (47 Cal.3d at pp. 884-885.)

2. *Boswell's libel complaint was filed without probable cause.*

In approaching our determination of whether Boswell's libel action was commenced with probable cause, we must first recognize the applicable test. The court in *Sheldon Appel* clarified the standard to be "whether any reasonable attorney would have thought the claim tenable. . . ." (47 Cal.3d at p. 886.) The test is objective rather than subjective. ". . . [I]t dose not include a determination whether the attorney subjectively believed that the prior

claim was legally tenable. [Citation.]" (*Id.* at p. 881.) The quality or extent of the attorney's research is irrelevant to the determination of probable cause. (*Id.* at pp. 882-883.) The established rule that experts may not give opinions on matters which are within the province of the court to decide applies to the probable cause element of the malicious prosecution tort. (47 Cal.3d at p. 884.)

Applying the appropriate probable cause standard to the facts of this case, we conclude that Boswell's libel complaint was not legally tenable, would not have been thought by any reasonable attorney to be tenable, and thus was filed without probable cause.

Our conclusion is based upon our finding that as a matter of law no reasonable attorney would think Family Farmers' advertisement to be actionable libel.

The tenor of the arguments on this issue has evolved. Until the filing of *Milkovich* v. *Lorain Journal Co.* (1990) 110 S.Ct. 2695, the parties directed argument to whether the language in the advertisement was fact or opinion. At the time of Boswell's action and until *Milkovich* it had been the law that expressions of opinion were accorded absolute constitutional protection while representations of fact were afforded a conditional privilege. (*Ollman* v. *Evans* (1984) 750 F.2d 970, 1021.) Boswell thus argued that the language of the advertisement could be interpreted as fact. Family Farmers argued it to be mere opinion. To the extent that the fact-opinion dichotomy may be applicable, we refer to the prior finding of this court in its affirmance of the summary judgment against Boswell in the libel action: "We conclude the trial court properly determined as a matter low that the challenged statement was opinion and therefore constitutionally protected, . . ." †

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† *J. G. Boswell Company* v. *Family Farmers for Proposition 9* et al. (Jun. 2, 1986) F004935.

In reaching this conclusion Justice Hamlin wrote:

> "Here, the challenged statement, along with three others, were phrased in the language of speculation about Boswell's motives for opposing the Peripheral Canal. The advertisement suggested that most farmers would benefit from the increase availability of water and then suggested various reasons why Boswell and Salyer, large agri-business concerns, might be opposed to such an undertaking. Although a conspiracy to create a trust violative of the Cartwright Act is indeed a criminal offense, we are not persuaded that the challenged advertisement fall into this trap. Taken as a whole, all four paragraphs speculating about Boswell's motivation are clearly that: they are speculation. Even though a criminal conspiracy can be committed without the necessity of accomplishing the goal of the conspiracy, we do not glean from the language of the advertisement any such accusation that Boswell was engaged in a present advertisement itself but also of the heated political debate in which it appeared, we cannot believe any reader would be misled into accepting defendants' clear speculation about Boswell's motivation as a factual accusation that Boswell was guilty of a criminal conspiracy. This is particularly true when the acts identified as imputing a criminal conspiracy are not completed acts." (*J. G. Boswell Company* v. *Family Farmers for Proposition 9* et al. Jun. 2, 1986) F004935.)

We agree.

The recent decision of the United States Supreme Court in *Milkovich* has, however, loosened the previous absolute privilege accorded to expression of opinion. *Milkovich* held that there is no "wholesale defamation exemption for anything that might be labeled 'opinion.'" (110 S.Ct. at p. 2705.) Instead, the court must make an independent judgment whether particular statements can be reason-

ably interpreted as stating actual defamatory facts about an individual. (*Id.* at p. 2706.) Where a statement of "opinion" on a matter of public concern reasonably implies false and defamatory facts regarding a private figure on a matter of public concern, a plaintiff must show that the false connotations were made with some level of fault. (*Id.* at pp. 2706-2707.) Upon application of its determination to the case before it, the court in *Milkovich* found the action was triable because a reasonable factfinder could conclude that statements in the relevant newspaper article implied that the plaintiff had perjured himself in a judicial proceeding. (*Id.* at p. 2707.)

Milkovich did not change the substantive law. "[E]xisting constitutional doctrine remained operative to protect free expression of ideas. That is, statements that cannot be 'reasonably interpreted as stating actual facts' are still entitled to constitutional protection. [Citations.]" (*Moyer* v. *Amador Valley J. Union High School Dist.* (1990) 225 Cal.App.3d 720, 724.) As stated by the *Moyer* court, the dispositive question is "whether a reasonsonable fact finder could conclude that the published statements imply a provably false factual assertion." (*Ibid.*)

The question is one of law for the court. (*Baker* v. *Los Angeles Herald Examiner* (1986) 42 Cal.3d 254, 260.) It is appropriate to apply the "totality of the circumstances" test to determine what is defamatory and what is rhetorical hyperbole. (*Ibid.*) "'[W]here potentially defamatory statements are published in a public debate, a heated labor dispute, or in another setting in which the audience may anticipate efforts by the parties to persuade others to their positions by use of epithets, fiery rhetoric or hyperbole, language which generally might be considered as statements of fact may well assume the character of statements of opinion.' [Citation.]" (*Ibid.*) Also to be considere is "'the circumstances and the time in which it is used.'" (*Id.* at p. 261.)

In *Ollman* v. *Evans*, *supra*, 750 F.2d 970, 979, the federal court in considering the context in which the statement was made considered the language as a whole, the context in which made, the audience addressed and the extent of factual verifiability. Also to be considered is the extent of public concern with the issue.

> "[T]he public has an interest in receiving information on issues of public importance even if the trustworthiness of the information is not absolutely certain. The First Amendment is served not only by articles and columns that purport to be definitive but by those articles that, more modestly, raise questions and prompt investigation or debate. By giving weight on the opinion side of the scale to cautionary and *interrogative* language, courts provide greater leeway to journalists and other writers and commentators in bringing issues of public importance to the public's attention and scrutiny." (750 F.2d at p. 983; *Baker* v. *Los Angeles Herald Examiner*, *supra*, 42 Cal.3d 254, 269, emphasis added.)

Applying these standards to Family Farmers' advertisement we again find appropriate and agree with Justice Hamlin's conclusions in the prior appeal.

> "Since the advertisement Boswell claims was libelous was published in the context of a hotly debated political campaign, i.e., the 1982 voter initiative on the Peripheral Canal, the advertisement is entitled to the greatest degree of protection afforded by the First Amendment.
>
> ". . .
>
> " . . . [T]he advertisement here challenged, appearing as it did in the political arena, encompassed merely the free use of 'epithets, fiery rhetoric or hyberbole' which is characteristic of such political communfinication. This becomes particularly important in light of the expectations of the reader, i.e., a

reader of political advertisements is less likely to look for fact and more likely to expect the exaggerated statements of one seeking to persuade the reader to his or her views.

". . .

". . . Thus, the statement is simply hypothetical speculation about Boswell's motivation in opposing passage of an initiative for the Peripheral Canal. The heading, 'To Freeze Out Competition?' followed by two statements . . . support the 'conclusion' that if all these contingencies occur, Boswell and Salyer would be able to dominate agri-business and set prices where they chose to. Nothing more is needed to complete the hypothetical, i.e., there is no undisclosed defamatory fact . . . ." (*J. G. Boswell Company* v. *Family Farmers for Proposition 9* et al. (Jun. 2, 1986) F004935.)

We conclude that under the totality of the circumstances, Family Farmers' advertisement was not defamatory but rhetorical hyberbole in the midst of a heated political campaign of great public interest and would not be found by any reasonable factfinder to imply any provable false factual assertions. This being so readily apparent, we further find that no reasonable attorney would have thought the advertisement libelous or Boswell's complaint tenable. There was no probable cause supporting Boswell's complaint against Family Farmers for libel.

B. *Does substantial evidence support the jury's finding that Boswell did not rely on the advice of counsel in good faith?*

Boswell contends the good faith reliance on the advice of counsel is a complete defense to an action for malicious prosecution. Boswell argues that even if Family Farmers had proved every element of their cause of action for malicious prosecution, judgment on that claim should be

reversed because Boswell presented overwhelming evidence of its good faith reliance on the advice of counsel.

The advice of counsel defense is an affirmative defense. The burden of proof is on the defendant-proponent. *Bertero* v. *National General Corp.* (1974) 13 Cal.3d 43, 54-55.) To establish the defense, the defendant must prove four elements. The defendant must show it in good faith consulted with a lawyer, that it stated all relevant facts of the purported cause of action to the attorney, that it was advised by the attorney that it had a good cause of action, and that it acted honestly on the attorney's advice. (*DeRosa* v. *Transamerica Title Ins. Co.* (1989) 213 Cal.App.3d 1390, 1396-1698; *Luccesi* v. *Giannini & Uniack* (1984) 158 Cal.App.3d 777, 788.)

Boswell contends that it presented substantial evidence to support its advice of counsel defense. In-house counsel Sterling read the advertisement and first consulted with president Fisher and J. G. Boswell. He then solicited the advice of attorney Chertok in Los Angeles. Boswell maintains that Sterling disclosed all relevant facts to Chertok because he showed Chertok the advertisement, denied the statements in the advertisement were true, and explained to Chertok the underlying political context of the accusations by Family Farmers. Chertok testified he reviewed the law and the facts and explained to Sterling that it was his opinion the advertisement was actionable. Sterling claims he did not make a final decision on whether to file the action until he consulted with president Fisher.

Family Farmers respond with factual arguments of their own. They contend that Sterling admitted he never had any information that anyone complained the ad damaged Boswell's reputation. Sterling also admitted in his testimony that there was no information from outside sources of hatred or ridicule directed at Boswell as a result of the ad. Sterling admitted that J. G. Boswell was only concerned that the ad was very effective for the yest on Proposition 9 campaign and not that the ad would

adversely affected Boswell's business or reputation. Boswell also never expressed any concern about the financial impact the ad would have on it as a company.

Sterling admitted under cross-examination that he never asked anyone in the legal community (other than Chertok) whether they perceived that the ad had charged Boswell with a crime. He was aware of statements by Mr. Fisher that he had considered trying to get the other side to stop the ad campaign before they decided to file a lawsuit. Sterling admitted that though Fisher was desirous of stopping the use of the ad during the rest of the campaign over Proposition 9, Mr. Chertok was never informed that filing a lawsuit for defamation could potentially be used for the collateral purpose of stopping the publication of future advertisements.

Chertok was never told that Boswell was concerned the advertisement was effective and he wanted it stopped. Sterling admitted that Chertok asked him no further questions and Chertok's legal opinion was based primarily on the advertisement. He further admitted that no one else associated with Chertok's law firm asked Sterling or anyone else from Boswell for any other information regarding the events surrounding the publication of the advertisement.

Chertok also never asked Sterling whether the rush to get the lawsuit filed had anything to do with the political campaign. Chertok was not told that Fisher wanted Sterling to do whatever he could to shut off fund raising for the yes on Proposition 9 campaign. Chertok was only told that Boswell was very active on the no on Proposition 9 side of the campaign. Chertok was not told that Boswell had set a campaign budget of $1 million for the no on Proposition 9 campaign. Chertok was not told that the Salyers had been consulted and they asked to be left out of the lawsuit.

Family Farmers submitted the above evidence to negate two elements of the affirmative defense of reliance on

advice of counsel. Family Farmers wanted to show that Chertok was not told all the facts surrounding Boswell's ulterior motives in filing the libel action. They also wanted to show that Boswell did not act honestly on Chertok's advice, but that its real purpose in filing the lawsuit was to suppress Family Farmers' political expression. If there was no basis for a libel action and if Boswell had ulterior motives in filing the libel action, then there was a failure to state all pertinent facts to Chertok and there was also a failure to act honestly and in good faith on Chertok's legal advice. If the jury accepted Family Farmers' evidence over Boswell's evidence on these points, then two critical elements of Boswell's affirmative defense would be negated.

All pertinent facts must be reported to counsel for the client to succeed on the affirmative defense that he relied on the advice of counsel in a malicious prosecution action. (*Bertero* v. *National General Corp.*, *supra*, 13 Cal.3d 43, 54; *Albertson* v. *Raboff* (1960) 185 Cal.App.2d 372, 385-386.) The jury was fully instructed with BAJI No. 7.36 as to the elements of the advice of counsel defense as creating probable cause for the prosecution of the libel action. The jury was specifically asked, in question No. 4 of the special verdict form, whether defendant J. G. Boswell Company acted in good faith upon the advice of counsel. The jury's response to this question was negative.

Boswell maintains that the malicious prosecution judgment must be reversed because there is absolutely no evidence submitted by Family Farmers to negate its overwhelming evidence supporting the affirmative defense of advice of counsel. An action must be reversed where there is no substantial evidence to support the verdict. (*Guntert* v. *City of Stockton* (1976) 55 Cal.App.3d 131, 142-143.) Substantial evidence is not just any evidence; it must be of credible and solid value. (*Kruse* v. *Bank of America* (1988 202 Cal.App.3d 38, 51-53.) It is apparent, however, that the jury did not accept Boswell's affirmative

defense and that it drew negative inferences against that defense from the evidence which had been submitted by Family Farmers. It impliedly found that Boswell had an ulterior motive in filing the lawsuit, did not inform counsel of specific relevant facts prior to the filing of the complaint and that it did not establish the elements of the defense of good faith reliance upon the advice of counsel.

Boswell is asking this court to reweigh the evidence. This is a task that goes beyond our duties as an appellate court. (*Meyer* v. *Byron Jackson, Inc.* (1984) 161 Cal.3d 402, 417.) Appellate courts view the record to find any substantial evidence to support the judgment below. Substantial evidence exists from the tesimony of a single witness. All reasonable inferences and intendments are indulged to support the trial court's judgment. (*In re Marriage of Slivka* (1986) 183 Cal.App.3d 159, 162-163; *Meadows* v. *Lee* (1985) 175 Cal.App.3d 475, 482; 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 268, pp. 276-277.) An appellate court does not resolve mere conflicts in testimony nor does it attempt to measure the truth or falsity of testimony. (*Crawford* v. *Southern Pacific Co.* (1935) 3 Cal.2d 427, 429; *Alderson* v. *Alderson* (1986) 180 Cal.App.3d 450, 465.)

We find that substantial evidence supports the jury's finding that Boswell did not rely on the advice of counsel in good faith.

C. *Application of the Statute of limitations to Jeff Thompson's claim for malicious prosecution.*

Boswell contends that Jeff Thompson's claim for malicious prosecution should have been dismissed as time barred by the trial court. Thompson's claim for malicious prosecution accrued on March 2, 1983, the day his motion for summary judgment on Boswell's libel action was granted. Jeff Thompson did not amend his cross-complaint to include a cause of action for malicious prosecu-

tion until June 3, 1985, just over two years after the trial court had granted summary judgment on Boswell's libel action.

Boswell contends that the doctrine of relation back to the original complaint does not apply to Jeff Thompson's claim because his amended cross-complaint did not rest on the same general set of facts or arise at the same time as the claims in his original cross-complaint. Boswell argues that the claims in the original cross-complaint for abuse of process and interference with constitutional rights arose from the filing of Boswell's libel action and the claim in the amended cross-complaint for malicious prosecution arose from the termination of that action one year later. Because of the difference between the filing of the libel action and the termination of that action, Boswell contends the relation back doctrine does not apply to Jeff Thompson's cause of action for malicious prosecution.

The statute of limitations for a malicious prosecution action is one year. Resolution of this issue, therefore, rests on whether the relation back doctrine can apply to a cause of action for malicious prosecution where the underlying cross-complaint has already been filed for abuse of process and for violation of constitutional rights. Normally, the relation back doctrine applies where there is a mere change of legal theory. For the doctrine to pertain, the amendment must be based on the same general set of facts and cannot be based on a different accident or instrumentality. (*Wennerholm* v. *Stanford Univ. Sch. of Med.* (1942) 20 Cal.2d 713, 718; *Austin* v. *Massachusetts Bonding & Insurance Co.* (1961) 56 Cal.2d 596, 600; *Espinosa* v. *Superior Court* (1988) 202 Cal. App.3d 409, 414-415; *Rowland* v. *Superior Court* (1985) 171 Cal.App.3d 1214, 1218.)

Thus, the issue that must be determined in the instant action is whether the injury for malicious prosecution was caused by the filing of Boswell's complaint, or

whether the instrumentality of Jeff Thompson's injury was a favorable termination of the libel action. If the trigger is the filing of the complaint by Boswell, then the malicious prosecution action is factually related upon the same facts as the abuse of process and interference with constitutional rights claims. If the factual trigger for the malicious prosecution cause of action is a favorable outcome in the underlying action, then new and different facts are the trigger for the malicious prosecution action and the relation back doctrine will not apply.

There are five elements to a cause of action for malicious prosecution. There must have been a prior institution of an action, without probable cause, with malice, with termination of the action favorable to the defendant in the original action, and resulting damage by way of attorney fees, mental distress, or injury to reputation or social standing. (*Harbor Ins. Co.* v. *Central National Ins. Co.* (1985) 165 Cal.App.3d 1029, 1036.) The question presented is whether the tort is completed upon the commencement of the malicious action or when there is termination of that action favorable to the defendant. Normally, a cross-complaint cannot be filed for malicious prosecution until there has been a favorable termination of the main action. (*Babb* v. *Superior Court* (1971) 3 Cal.3d 841, 846-847; *Jenkins* v. *Pope* (1990) 217 Cal. App.3d 1292, 1297-1299.)

In *Harbor Insurance* the court analyzes the problem of a coverage battle between two insurance companies over which policy was in effect at the time an action for malicious prosecution was brought against an insured. The court had to determine whether the tort of malicious prosecution began at the time the malicious action was filed or at the time there was a favorable termination of that action for the defendant. The court found that the tort of malicious prosecution is committed when the malicious action is commenced and the defendant is subject to process. In so finding, the *Harbor*

Insurance court reasoned that four of the five elements of malicious prosecution arise from the commencement of the malicious action, or at least no later than when the targeted defendant receives notice of its pendency. The lone exception is the favorable termination requirement. While the favorable termination may occur years after process is initiated against a defendant, that element is not considered part of the wrong committed by the plaintiff or by the prosecutor. (165 Cal.App.3d at p. 1036.)

Harbor Insurance found that the favorable termination requirement constitutes a precondition for the cause of action of malicious prosecution because the defendant's success in the malicious prosecution action refutes a presumption of probable cause that would otherwise appertain to the underlying litigation. Also, the requirement serves the practical concerns of judicial economy by forestalling unnecessary and unfounded actions. (Also see *Babb* v. *Superior Court*, *supra*, 3 Cal.3d 841, 845-847.) Thus, the tort of malicious prosecution arises at the commencement of the previous lawsuit. Maintenance of the suit beyond that point simply serves to aggravate damages. (*Zurich Ins. Co.* v. *Peterson* (1986) 188 Cal.App.3d 438, 448.)

If the beginning of a malicious prosecution action is the commencement of the malicious action, then the fact there is one additional element to the tort requiring a favorable termination is not dispositive nor is it an important fact. As the cases indicate, the main policy reason for requiring a favorable termination is to serve the purposes of judicial economy and orderly process. There is no merit to Boswell's contention that the new or additional fact that takes the malicious prosecution action outside the ambit of the facts or occurrence of the filing of the libel action is the favorable termination of the libel action in favor of Family Farmers.

For the doctrine of relation back to apply, the same underlying facts or offending instrumentality must cause damages. (*Barrington* v. *A. H. Robbins Co.* (1985) 39

Cal.3d 146, 150-151.) The amended complaint relates back where the offending instrumentality is deemed to be within the chain of causation. (*Olson* v. *Volkswagen of America* (1988) 201 Cal.App.3d 1437, 1443.) Amending a pleading to merely state a different legal theory then relates back to the original complaint as long the same instrumentality or underlying facts in the chain of causation exist for both legal theories. (*Lamont* v. *Wolfe* (1983) 142 Cal.App.3d 375, 378-382.)

The chain of causation giving rise to injuries suffered by Family Farmers was the malicious filing of the libel action against them by Boswell. The filing of that action was within the chain of causation and gave rise to the same basic underlying facts for both the abuse of process claim and for the malicious prosecution claim. Had Family Farmers attempted to plead malicious prosecution before there had been a favorable termination of the underlying libel action, the superior court would have been compelled to dismiss that cause of action from the complaint.

The trial court properly permitted Jeff Thomson the opportunity to amend his cross-complaint to state a cause of action for malicious prosecution under the relation back doctrine.

II.

IS STATE ACTION NECESSARY FOR FAMILY FARMERS TO SUCCESSFULLY MAINTAIN A TORT ACTION FOR BOSWELL'S INTERFERENCE WITH THEIR CONSTITUTIONAL RIGHTS?

At trial Family Farmers prevailed in their cause of action for interference with constitutional rights to free speech under article I, section 2 of the California Constitution.

Article I, section 2 of the California Constitution provides in pertinent part: "(a) Every person may freely

speak, write and publish his or her sentiments on all subjects, being responsible for the abuse of this right."

Boswell contends that as a matter of law it cannot be liable for any interference with Family Farmers' constitutional rights absent a showing of significant state action. Boswell claims because Family Farmers have not pled nor have they proven state action, Boswell cannot be legally responsible for deprivation of their constitutional right to free speech.

Boswell alternatively argues that Family Farmers have failed to produce substantial evidence to support liability for interference with constitutional rights. Family Farmers respond arguing that Boswell misconstrues recent case law which omit any requirement of state action or which apply the "implied sanction of the state's police power" standard. Newspapers are an important medium for the exercise of the rights of speech, and denial of access to them by a private person is an actionable wrong without regard to state action. Involving judicial machinery to restrict access to the print media invokes the implicit sanction of the police power.

A. *Federal standard.*

The United States Supreme Court has long maintained that violations of the Fourteenth Amendment are only actionable if the actor violating the rights of another individual is a state actor or is acting under the color of state authority. (*Civil Rights Cases* (1883) 109 U.S. 3.) In *Shelly* v. *Kraemer* (1948) 334 U.S. 1, the United States Supreme Court addressed the issue of whether an individual depriving another individual of a legal right through use of the state court system could constitute state action. There, private property owners in Missouri and Michigan sued sellers of property who attempted to transfer the property to racial minorities in violation of racially restricted covenants that were set forth in the deeds to the property. Adjacent property owners at-

tempted to enforce the racially restrictive covenants in state court. (*Id.* at pp. 4-8.)

The United States Supreme Court held that the attempt to deny private individuals the right to transfer property to whomever they pleased was a violation of the equal protection clause of the Fourteenth Amendment and that it constituted state action because state courts were being used to enforce the illegal covenants. (334 U.S. at pp. 20-23.)

In *Flagg Brothers, Inc.* v. *Brooks* (1978) 436 U.S. 149, 164-166, the private owner of a warehouse placed a lien on private property that had been stored there and sent notice to the owner that the property would be sold in 10 days if the lien was not satisfied. Sale was permitted pursuant to section 7-210 of the Uniform Commercial Code. The property owner claimed that the sale violated the due process and equal protection clauses of the Fourteenth Amendment. (*Id.* at p. 153.) The United States Supreme Court held that the sale did not violate either the equal protection nor the due process clause of the Fourteenth Amendment. The court found that section 7-210 of the Uniform Commercial Code permitted but did not compel the private sale of goods. The court refused to find that the state had acted in the private sale of the goods. The court found instead that the state refused to act in the private sale of the goods. No state action was found in *Flagg Brothers*. (436 U.S. at pp. 164-166.)

Family Farmers would draw an analogy to *Shelly*. They would argue because the state courts were used in the malicious prosecution of Boswell's libel action that the use of the state courts is equivalent to the type of state action found in *Shelly* because the courts were improperly used by a private party to deprive another private party of a fundamental constitutional right.

We do not find this argument compelling. Unlike *Shelly*, the courts in California are not attempting to

deprive a private individual from exercising any right through the filing of a libel action. Libel has long been recognized as an exception to one's constitutional right to free speech. (*Edwards* v. *Publishing Soc.* (1893) 99 Cal. 431, 439-440.) The fact that a libel action can be maliciously prosecuted by a private individual is not enough in itself to convert the private actor's conduct to state action.

This case is more closely analogous to *Flagg Brothers* than it is to *Shelly*. Though the right to own property is a fundamental right protected by the Fourteenth Amendment to the Constitution, the mere fact the private sale of that property was authorized by state statute did not convert the private individual's activity into state action. Here, the fact the state permits libel actions to be filed by one private individual against another private individual does not convert the libel case into state action merely because it was maliciously prosecuted.

Even assuming that Family Farmers could not maintain a state action theory pursuant to *Shelly*, they are not without redress under state law to remedy any wrong committed by Boswell by its maliciously prosecuted libel action. This case illustrates the fact that Family Farmers have a remedy at law which is the maintenance of their own malicious prosecution case against the private sector who improperly brought the libel action. In *Shelly*, there was no way for the buyer and seller of the property to seek redress for the enforcement of the racially restrictive covenant, because the very forum in which they could seek that redress was responsible for denying them equal protection of the law by enforcing illegal covenants. Boswell's action in maliciously filing a libel suit is not illegal though it does give rise to civil damages for the tort of malicious prosecution or the tort of abuse of process. Under the applicable federal standard, Boswell's filing of a libel action against Family Farmers may have in some form deprived Family Farmers of the constitu-

tional right to free speech, it did not constitute state action.

B. *State standard.*

California does not apply the same standard for determining whether a private actor has improperly denied another private actor a fundamental constitutional right. The California Constitution does not have the identical state action requirement that is set forth in the Fourteenth Amendment of the United States Constitution which expressly requires state action.

One illustration of the difference between federal and California law can be found in *Robbins* v. *Pruneyard Shopping Center* (1979) 23 Cal.3d 899, 908-911. There, students opposing a United Nations resolution attempted to peacefully solicit signatures for a petition to the government at a private shopping center. The center had a policy against engaging in public expressive activity that was not directly related to the commercial purposes. The students were asked to leave the shopping mall because they did not have permission to solicit. The California Supreme Court concluded that sections 2 and 3 of article I of the California Constitution protect speech and petitioning, reasonably exercised, in shopping centers. This is true even if the shopping center is privately owned. The rationale for the court's decision was that the shopping center had a character of having become the modern equivalent of a downtown business district. Under these facts, the concept of state action was not found to be a bar to a lawsuit by one private actor suing to protect constitutional rights as against another private actor.

In *Laguna Publishing Co.* v. *Golden Rain Foundation* (1982) 131 Cal.App.3d 816, the owners of the streets, sidewalks and other common areas of a private retirement community called Leisure World accorded exclusive delivery privileges to a certain small free newspaper. The publishers of an independent free newspaper were not allowed to deliver the newspaper to Leisure World resi-

dents on the theory that Leisure World was private property.

Laguana Publishing Co. found that there was a violation of the free speech rights of the independent newspaper when it was excluded from delivering the paper to Leisure World. (131 Cal.App.3d at pp. 820-822.) *Laguna Publishing* held that though the public was excluded from Leisure World, that Leisure World in effect had the attributes of a municipality and that it had to either exclude all newspapers to which individual residents had not personally subscribed or permit the independent newspaper access to deliver its papers to the residents. (*Id.* at p. 839.) The court determined that "[the common area owner's] acting with the implicit sanction of the state's police power behind it, impermissibly discriminated against the free speech and free press rights of plaintiff, guaranteed to it under the state Constitution, by excluding it from Leisure World after it . . ., without authority from the residents of Leisure World, had chosen to permit the unsolicited delivery of the Leisure World News to the residents of Leisure World." (*Id.* at p. 844.) The court found that Leisure World, while not a "company town," was a hybrid with town-like characteristics. The court found that when this element is added "the balance tips to the side of the scale which imports the presence of state action per *Mulkey* and the lunch counter cases." (*Id.* at p. 843.)

Thus in *Laguna* it was the combination of the town-like characteristics of the entity together with the discriminatory conduct which supplied the ingredient of implicit sanction of the state's police power. *Laguana Publishing* further held that the private newspaper had a direct cause of action for the violation of its constitutional rights independent of any enabling legislation under the California Constitution. In effect, *Laguna Publishing* found that a cause of action was self-executing under the California Constitution for the violation of the right to free speech. (*Id.* at p. 853.)

In *Leach* v. *Drummond Medical Group, Inc.* (1983) 144 Cal.App.3d 362, a medical group was found to have a monopoly of medical services in Ridgecrest, California, the nearest comparable medical facility being 100 miles away. Plaintiffs each suffered serious medical infirmities. Plaintiff wrote to Licensing and Certification Division of the California Department of Health Services describing certain experiences at the hospital and with a particular physician. Investigations followed. Thereafter defendant notified plaintiffs that due to their allegations the medical group would no longer provide services to plaintiffs. Plaintiffs filed their complaint alleging, inter alia, interference with plaintiffs' right to petition their government under Article I, section 3 of the California Constitution. The trial court sustained demurrers without leave to amend on the theory there could be no private cause of action to fight the monopolistic practices of the medical group because there was no state action. This court found that the demurrer was improperly granted without leave to amend. (*Id.* at p. 365.) Responding to defendant's claim that state action was a prerequisite for a claim for abridgment of constitutional rights, we stated, "we are not persuaded that state action is a necessary allegation under all circumstances." (*Id.* at p. 375.)

In view of our general statement, respondent would argue that *Leach* stands for the proposition that under the there present facts station action was found not to be a prerequisite. We disagree. In *Leach*, the issue was whether the sustaining of defendant's demurrer without leave to amend was erroneous. We first addressed defendant's specific statement that state action was *always* a prerequisite. The discussion of *Pruneyard* which followed resulted in the doubt which was the basis for the above-quoted statement. We then stated, "Nothing in the [*Pruneyard*] opinion causes us to believe that plaintiffs could not amend . . . to state a cause of action. [¶] . . . [W]e recognize also the possibility plaintiffs may be able to amend their complaint to allege state action based on

receipt of federal funds [citation]." (*Id.* at pp. 375-376.) We conclude that *Leach* did not specifically reach a determination as to whether state action or its equivalent was or was not a prerequisite.

Thus, California does not have the same rigorous requirement for state action which is expressly set forth in the Fourteenth Amendment of the United States Constitution. California courts have been far less reticent to permit lawsuits between private actors to enforce constitutional rights than the federal courts. Also, unlike the federal Constitution, the California Constitution is a self-executing document which permits the initiation of a cause of action to enforce the particular rights established under it even if those rights are violated not by the state but by private actors. Because of the special dignity accorded the rights of free speech and press, plaintiffs are afforded the right to seek damages for violations of that rights without enabling legislation. (*Fenton* v. *Groveland Community Services Dist.* (1982) 135 Cal. App.3d 797, 804-805.)

There is, however, a limit to the right of free speech in California. In *Cox Cable San Diego, Inc.* v. *Bookspan* (1987) 195 Cal.App.3d 22, 24-25, the private owner of a 150-unit apartment complex had a contract with a cable company to provide cable service to the tenants of the complex. The property was sold to a new owner who entered into a new contract with a satellite service. The satellite service disconnected the cable system. The cable company reconnected some of the subscribers and refused to disconnect when the demand to do so was made by the satellite company. Though the cable company obtained a temporary restraining order, they lost during a hearing for a preliminary injunction. The trial court ruled that the cable company had adequate legal damages pursuant to their original contract. The cable company unsuccessfully sought a preliminary injunction based on First Amendment grounds.

Cox Cable San Diego held there was nothing in the record to suggest that the apartment complex was a quasi-public forum such as the shopping mall in *Pruneyard*. People were not invited to gather there. *Cox Cable San Diego* further found that earlier cases involved at most transitory trespasses by leafletters and speakers. None involved the sort of permanent physical occupation sought by the cable company in that case. (195 Cal.App.3d at pp. 28-30.)

Boswell argues vigorously that it was not engaged in a public function. Boswell further argues that even the more liberal California authorities require at least the appearance of some kind of public function before one private actor can sue another without the presence of some kind of state action.

While the original requirement of traditional state action is not necessary under the California Constitution, Boswell's contention that under the California Constitution and cited cases there still has to be some sort of public function before a private cause of action exists is not without merit. The shopping center in *Pruneyard* had many of the characteristics of a traditional downtown. Leisure World in *Laguana Publishing* had many of the traditional "town-like characteristics."

Where private actors' access to information or freedom under the First Amendment is limited by a traditional notion of private property ownership, the California authorities have been willing to protect the constitutional right over the private property right. However, there has been in the California cases something akin to a public setting or public-like function before the courts have permitted the enforcement of a constitutional right at the expense of private interests.

In the instant action, Boswell did not play the role of a traditional municipality or a traditional town-like residential neighborhood. Boswell is a private farming cor-

poration which engaged in the political arena. Though its conduct was arguably offensive and it did spend over $1 million in the campaign to deefat the peripheral canal initiative, these factors alone are not enough to make it a state-like actor. Further, we find no basis to conclude that anything involved in or arising from Boswell's conduct invoked the implicit police power of the state. We thus conclude that the finding for Family Farmers on the cause of action for interference with constitutional right cannot support the judgment. We find it unnecessary to address Boswell's additional contention that Family Farmers failed to produce substantial evidence to support liability for interference with constitutional rights.

Boswell further contends that reversal of any one count of the general verdict necessitates reversal of the entire judgment. Boswell relies upon *Farajpour* v. *University of Southern California* (1990) 221 Cal. App.3d 19. This opinion was ordered withdrawn by the California Supreme Court on September 13, 1990, and can no longer be cited. We have found authority holding that where a court commits instructional error and its seems probable that the jury's verdict may have been based on the erroneous instruction, then prejudice exists and the court should not speculate upon the basis of the verdict. (*Cobbs* v. *Grant* (1972) 8 Cal.3d 229, 238.)

We find *Cobbs* distinguishable from the instant action. We agree with Boswell that the verdict here is a general verdict. Our reversal of the constitutional tort theory, however, is not based on any fundamental instructional error by the trial court. We have found no error in the trial court's instruction on the constitutional tort theory.

The defects in the constitutional tort theory are related to the discussion above concerning the implicit use of police power by Boswell. Nothing in the trial court's instructions on this count prejudiced the jury in its deliberations on any other count. The lack of any instructional error is matched here with the fact that the testi-

mony would, in all probability, have been identical in the absence of this count. Unlike *Cobbs*, there was nothing inherently prejudicial to Boswell by the presence of this count, the trial court's instructions on this theory or the plaintiff's evidence at trial.

Where a judgment is entered on a general jury verdict, our task is usually very limited. A general verdict will not be disturbed on appeal if one single count is supported by substantial evidence *and* is unaffected by error. Our task on appeal is narrow and circumscribed. We must merely find that one of the multiple causes of action is supported by substantial evidence and is unaffected by error. (*Khanna* v. *Microdata Corp.* (1985) 170 Cal.App. 3d 250, 258, disapproved on other grounds in *Foley* v. *Interactive Data Corp.* (1988) 47 Cal.3d 654, 689, 698-700.)

Any error in the application of Family Farmers' cause of action for constitutional tort did not taint their other causes of action. Thus, we must follow the general rule that the geners' verdict will stand if the evidence supports it on any one sufficient count. (*See DeTomasso* v. *Pan American World Airways, Inc.* (1987) 43 Cal.3d 517, 533.) The standard we must follow where there is a general verdict is fundamentally one of fairness. Where improper instructions and prejudicial evidence combine to undermine the integrity of a verdict, our duty is to reverse in face of a general verdict. Where the error related to a count does not taint other counts, fairness dictates that the general verdict be affirmed.

III.

WAS BOSWELL'S CONDUCT SUFFICIENT TO ESTABLISH ABUSE OF PROCESS?

Boswell next contends that judgment on Family Farmers' abuse of process cause of action must be reversed. Boswell claims that Family Farmers "have neither al-

leged nor proven any misuse of judicial process." Boswell further argues as a matter of law the content of its libel complaint is privileged under Civil Code section 47, subdivision (a)(2) and that the mere filing of a complaint does not constitute abuse of process.

Boswell's contentions miss the focus of Family Farmers' theory of abuse of process. Family Farmers concede that the mere filing of a libel complaint will not sustain a claim for abuse of process but contend that the evidence at trial establishes much more than the mere filing of the complaint. Family Farmers further respond that while the contents of the complaint would be privileged in the context of a lawsuit itself, the extrajudicial republication of the complaint to the newspaper publishers was not privileged.

It is not the filing of the lawsuit or the specific language contained in the complaint upon which respondents base their abuse of process theory. Rather, it is the subsequent use of the document for a purpose and advantage apart from the proceeding itself of which they complain. It is this aspect which distinguishes the abuse of process cause of action from the malicious prosecution cause of action.

> " 'Abuse of process differs from malicious prosecution in that the gist of the tort is not commencing an action or causing process to issue without justification, but misusing or misapplying process justified in itself for an end other than that which it was designed to accomplish. The purpose for which the process is used, once it is issued, is the only thing of importance. Consequently in an action for abuse of process it is unnecessary for the plaintiff to prove the proceeding has terminated in his favor, or that it was obtained without probable cause or in the course of a proceeding begun without probable cause. . . .' " (*Spellens* v. *Spellens* (1957) 49 Cal.2d 210, 232.)

A plaintiff must prove two essential elements to state a cause of action for abuse of process. There must be a

wilful act in the use of process which is not proper in the regular conduct of the proceedings. Additionally, there must be a showing that the defendant entertained an ulterior motive or purpose in using the process. (*Coleman* v. *Gulf Ins.* (1986)) 41 Cal.3d 782, 792; *Barguis* v. *Merchants Collection Assn.* (1972) 7 Cal.3d 94, 103-104; *Templeton Feed & Grain* v. *Ralston Purina Co.* (1968) 69 Cal.2d 461, 466.).

> " 'Some definite act or threat not authorized by the process, or aimed at an objective not legitimate in the use of the process, is required; and there is no liability where the defendant has done nothing more than carry out the process to its authorized conclusion, even though with bad intentions. The improper purpose *usually takes the form of coercion to obtain a collateral advantage, not properly involved in the proceeding itself,* such as the *surrender of property or the payment of money, by the use of the process as a threat or a club.* There is, in other words, a form of extortion, and it is what is done in the course of negotiation, rather than the issuance or any formal use of the process itself, which constitutes the tort.' [Citation.]" (*Spellens* v. *Spellens, supra,* 49 Cal.2d 210, 232-233.)

Family Farmers argues that Boswell did more than just file a complaint. Family Farmers further contend that Boswell had the ulterior motive in filing the complaint to undermine the yes on Proposition 9 campaign. They point to testimony at the trial from president Fisher of Boswell to support their claim that Boswell, in filing the lawsuit, had the ulterior motive and purpose to intimidate small farmers in Kern County from supporting Proposition 9.

Fisher testified that he did everything in his power to win the campaign. Boswell set a budget for that campaign. As part of Boswell's fight against the peripheral canal, it wanted that budget not to be exceeded. Part of Boswell's strategy was to try to entice large contributors

from the other side of the issue to withdraw their contributions to the yes on 9 campaign. Boswell was also having meetings with small farmers in Kern County because they were contributing to the yes on 9 campaign. Again, Boswell was attempting to persuade the smaller farmers from making contributions to the yes on 9 campaign. Fisher further admitted there were a few pushers and shakers among the small farmers who were really moving the yes on 9 campaign in Kern County. He admitted the lawsuit, as eventually filed, was against some of these individuals.

Fisher admitted he was concerned that Boswell's advertising agency had produced and published advertisements making big oil companies the scapegoat for the yes on 9 campaign. Fisher believed these advertisements were cheap shots. He admitted the advertisements bothered him for a few days but he got over his concern. He believed the advertisements were extremely effective.

Fisher also admitted that Boswell did decide to take "any action in order to adversely impact the ability of the pro-Proposition 9 forces to raise money." Fisher also had to decide which of the small farmers to sue after the advertisement had been published. Immediately before the lawsuit was filed, Fisher called Fred Starr and obtained his guarantee that he would not put any more money into the yes on Proposition 9 campaign. Because Mr. Starr had agreed not to contribute any more money to the Proposition 9 forces, Fisher recommended he not be named in the lawsuit. Fisher admitted he contacted Arco, Atlantic Richfield, Union Oil, Shell Oil, South Kern Machinery (an equipment company), Pure Gro and several businessmen in Los Angeles in an attempt to prevent them from contributing any more monies to the yes on Proposition 9 campaign. The basic message was "The Boswell Company supports people that support them." Fisher admitted that these phone calls helped Boswell win the campaign against Proposition 9.

From all of this evidence, it was reasonable for the jury to infer that Boswell had an ulterior motive in filing the lawsuit against Family Farmers, that motive or purpose being to dry up funding for the yes on Proposition 9 campaign. This would serve the dual goals of defeating Proposition 9 as well as keeping Boswell well within its targeted budget for the no on Proposition 9 campaign.

Abuse of process also requires a wilful act in the use of process which is not proper in the usual conduct of the proceeding. The concept of process is a broad term. The concept of abuse is equivalent to the misuse of a court's power done under the court's authority for the purpose of perpetrating an injustice. It is considered a perversion of the judicial process to the accomplishment of an improper goal. The action lies generally only where process is used to obtain an unjustifiable collateral advantage. Mere vexation or harassment is not enough. (*Younger* v. *Solomon* (1974) 38 Cal.App. 3d 289, 296-297.)

The mere fact that a complaint has been filed for damages is not enough to state a cause of action for abuse of process. The filing of a complaint is privileged pursuant to Civil Code section 47. (*Oren Royal Oaks Venture* v. *Greenberg, Bernhard, Weiss & Karma, Inc.* (1986) 42 Cal.3d 1157, 1169; *Drasin* v. *Jacoby & Meyers* (1984) 150 Cal.App.3d 481, 485.) Boswell contends the only act it accomplished that could be attributed to an ulterior purpose or motive with regard to the abuse of process cause of action is the filing of a lawsuit.

Family Farmers maintain that the filing of the libel complaint is one link in a long chain of activity designed not only to prevent them from speaking out against Boswell and the no on Proposition 9 position but to save Boswell large sums of additional funds in the campaign against Proposition 9. Boswell engaged in activity simultaneous to and after the filing of the lawsuit which may be construed as an attempt to obtain a collateral advantage through misuse of the filed libel complaint.

The libel complaint was filed on May 14, 1982. On that date letters were sent to the Bakersfield Californian and the Hanford Sentinel demanding a retraction of the advertisements. On the same date, Boswell sent letters to 11 newspapers across California advising them of the lawsuit that had been brought against Family Farmers and warning them in a veiled threat not to publish future advertisements by Family Farmers. The letter to these newspapers advised that the attached advertisement had already appeared in two California newspapers. Enclosed was a face sheet from the libel action. Appearing on the face sheet was the caption including named parties and "Does 1 through 1000, inclusive, Defendants." The letter then stated that its purpose was to request the publisher to exercise its good faith offices and judgment and to refuse a request from Family Farmers to publish any additional ads because the ad was libelous in Boswell's opinion. The letter sets forth the additional purpose of providing the publisher "with sufficient knowledge of the ad so that [the publisher would] have appropriate time to check the sources of the ad for accuracy and to reflect upon the libelous nature of the ad."

The ad taken out by Family Farmers was within the scope of normal political debate and discourse. It is improper to use process as a form of coercion to obtain a collateral advantage. Boswell's use of the letter to the publishers with the enclosed face sheet of the complaint in an attempt to prevent the potential publication of the advertisement by Family Farmers with the motive of defeating fund raising is the kind of improper collateral advantage envisioned by the tort of abuse of process.

We conclude the evidence pertaining to the republication of the complaint to the various publications established a sufficient showing of a wilful act in the use of process which was not proper in the regular conduct of the libel proceedings, and that such act was done with an ulterior motive or purpose and to obtain a collateral advantage.

IV.

SUFFICIENT EVIDENCE OF COMPENSATORY DAMAGES

Boswell argues that as a matter of law the harm suffered by Family Farmers was not sufficient to permit a recovery for emotional distress. Boswell further contends that Family Farmers' emotional distress was not severe enough and was not accompanied by physical injury or other economic loss.

Boswell relies on older authorities for the proposition that emotional distress must be severe and there must be evidence of other economic losses aside from emotional distress itself. (*Gruenbeurg* v. *Aetna Ins. Co.* (1973) 9 Cal.3d 566, 580; *Fletcher* v. *Western National Life Ins. Co.* (1970) 10 Cal.App.3d 376, 379.)

A plaintiff's allegation that he or she suffered emotional injuries and psychological trauma is adequate to state a cause of action for emotional distress. *Molien* v. *Kaiser Foundation Hospitals* (1980) 27 Cal.3d 916, 929-930, abrogated the rule requiring physical injury before compensation for emotional distress is possible. (*Hedlund* v. *Superior Court* (1983) 34 Cal.3d 695, 706, fn. 8.) Injury to feelings is compensable if it is inflicted by a private person and the injury is foreseeable. (*Delta Farms Reclamation Dist.* v. *Superior Court* (1983) 33 Cal.3d 699, 711.) On the other hand, light emotional distress is not compensable. Mere worry, anger, frustration or a few sleepless nights are not enough to sustain a cause of action for emotional distress. (*Young* v. *Bank of America* (1983) 141 Cal.App.3d 108, 114-115.) The old requirement that additional injuries are necessary beyond the infliction of emotional distress by itself, however, has been abrogated. (*Pintor* v. *Ong* (1989) 211 Cal.App.3d 837, 845.)

Boswell characterizes the testimony at the trial as establishing only that Family Farmers were "anxious," "appre-

hensive," "concerned," "upset" and "suffered a few sleepless nights" as a result of having the libel action brought against them.

Family Farmers counter this characterization with a more significant and overwhelming body of evidence in support of their contention that they suffered severe emotional distress. Jack Thomson felt the lawsuit was disastrous and feared that his family would lose everything. Jeff and Jack Thomson's insurance companies cancelled some of their insurance policies as a result of the litigation. Jack Thomson's insurer suggested he not get involved in any more political campaigns. Ken Wegis suffered the same fate from his insurance company which agreed only reluctantly to defend him but refused to insure him for any of the losses resulting from the litigation. Upon hearing of the suit Wegis returned immediately from Oregon.

The Thomsons feared the banks would not renew their annual crop financing because of the threat posed by the lawsuit and the potential loss of equity in their farms. These fears remained throughout the duration of the lawsuit. Ken Wegis testified that a judgment against him in the millions of dollars would have forced the liquidation of his entire farming operation.

Jeff Thomson testified that he was terrified at the amount of the lawsuit. He was concerned for his family's welfare. He testified that the lawsuit effectively shut down the pro-Proposition 9 campaign in Kern County. It inhibited his ability to function or to talk to people. The lawsuit impacted his friendships and his political activities. Jeff Thomson described the litigation as a constant worry, as something that constantly gnawed at him.

The lawsuit created a great deal of stress not only for the named parties, but for their families as well. The families also went through a great deal of anxiety and fear for what the future would hold for them in the

event Boswell prevailed in the libel action. Mrs. Wegis testified that her husband's life revolved around the family operations and that the lawsuit worried him a great deal. She testified that her husband was not sleeping at all and that the entire course of the litigation was "a terrible time for us and for our whole family." She stated the entire family was in a state of shock and very depressed throughout the course of the litigation.

Boswell's characterization of Family Farmers' emotional distress as amounting to a few sleepless nights is contradicted by strong evidence to the contrary presented by Family Farmers. Going through a period of shock and depression with extended sleepless periods, a period in which one fears for one's financial future and fears to continue involvement in political activities in which one had traditionally participated is not simple worry or simple anger or simple frustration. Such concern is not equivalent to just a few sleepless nights. The trial court's finding that the jury was swayed by passion and prejudice, which is discussed in the cross-appeal, affects the issue of damages and not the issue of liability. Though Boswell points to opposite evidence from which another conclusion could be drawn, it is not the province of this court to reweigh the evidence adduced at trial. We conclude that there is sufficient evidence of severe emotional distress to support the reduced award of compensatory damages.

V.

PUNITIVE DAMAGE AWARD

Boswell contends that the $10.5 million punitive damage award violates the due process clause of the Fourteenth Amendment of the United States Constitution. Boswell also contends the damage award is clearly excessive as a matter of law, that it is wholy disproportionate to the actual damages suffered by Family Farmers, and that there is insufficient evidence to support the finding

that Boswell acted with malice. Boswell argues the trial court failed to properly instruct the jury on despicable conduct and this is an additional ground for reversing the judgment.

Due process.

Boswell challenges the fundamental constitutionality of the jury's discretion to award punitive damages as a violation of the due process clause of the Fourteenth Amendment of the United States Constitution. This issue was discussed at length in the recent United States Supreme Court decision in *Pacific Mutual Life Insurance Company* v. *Haslip* (1991) —— U.S. ——, 59 L.W. 4157. The due process challenge to Alabama's system of awarding punitive damages in *Haslip* is nearly identical to Boswell's challenge to punitive damages in the instant action.

The *Haslip* action arose from an insurance agent's failure to forward health insurance premiums. The health insurance policies lapsed as a result. Damages for fraud were claimed by the insured. The case against Pacific Mutual was submitted to the jury under a theory of respondeat superior. After the trial court instructed the jury on liability theories, it further instructed the jury that it was to determine whether there was liability for fraud. If so, it could award punitive damages. Pacific Mutual made no objection on the ground of lack of specificity in the instructions. No evidence was introduced on the issue of Pacific Mutual's financial worth. Haslip was awarded just over $1 million. Three other plaintiffs were awarded between $10,000 and $15,000. (—— U.S. ——, 59 L.W. at p. 4158.)

After disposing of Pacific Mutual's claim that its due process rights were violated by application of the doctrine of respondeat superior on the action for fraud, the United States Supreme Court noted that punitive damages have long been a part of traditional state tort law. The court found that under the traditional common-law approach

the amount of punitive damage award is determined by a jury instructed to consider the gravity of the wrong and need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable. (—— U.S. ——, 59 L.W. at pp. 4160-4161.) After considering various authorities, the Supreme Court made the following finding concerning the constitutionality of the common-law method for assessing punitive damages:

> "So far as we have been able to determine, every state and federal court that had considered the question has ruled that the common-law method for assessing punitive damages does not in itself violate due process. [Citation.] In view of this consistent history, we cannot say that the common-law method for assessing punitive damages is so inherently unfair as to deny due process and be *per se* unconstitutional. '"If a thing has been practised for two hundred years by common consent, it will need a strong case for the Fourteenth Amendment to affect it."'" (—— U.S. ——, 59 L.W. at p. 4161.)

After finding that the common-law method of assessing punitive damages was not so inherently unfair as to deny due process, the United States Supreme Court made the following observation concerning which standards juries should follow in assessing punitive damages:

> "One must concede that unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. [Citation.] We need not, and indeed we cannot, draw a mathematical bright line between the constitutionallly acceptable and the constitutionally unacceptable that would fit every case. We can say, however, that general concerns of reasonableness and adequate guidance from the court when the case is tried to a

jury properly enter into the constitutional calculus." (—— U.S. ——, 59 L.W. at p. 4161, fn. omitted.)

The Alabama trial court used a jury instruction that was even more general than the jury instructions used in the instant case. The jury was instructed that the amount of money awarded to a plaintiff in a punitive damage award is not to compensate the plaintiff for an injury but to punish the defendant. The jury was told that the purpose of awarding punitive damages is to allow a money recovery to the plaintiffs by way of punishment to the defendant and for the added purpose of protecting the public by deterring the defendant and others from similar wrongdoing in the future. The jury was charged that imposition of punitive damages was entirely discretionary with it and that it did not have to award punitive damages. The jury was then told that should it award punitive damages that it must take into consideration the character and degree of the wrong as shown by the evidence and the necessity of of preventing a similar wrong in assessing the amount of damages. (—— U.S. ——, 59 L.W. at p. 4158.)

The United States Supreme Court acknowledged that the instructions given to the jury invested it with significant discretion but that the jury's discretion in awarding punitive damages was not unlimited. (—— U.S. ——, 59 L.W. at pp. 4161-4162.) The *Haslip* court was careful to note that the Alabama Supreme Court had established posttrial procedures for scrutinizing punitive damage awards. Under the Alabama system, the Alabama Supreme Court itself provided an additional check on the jury's or trial court's discretion. (*Ibid.*)

California's procedures for awarding punitive damages are similar to Alabama's. Like Alabama, California provides both trial court and appellate court review of a punitive damage award. Furthermore, the instructions given to the jury in the instant case were more elaborate than those given to the jury in the *Haslip* action. The

jury here was instructed in the first phase of the trial that it could consider whether or not to award punitive damages. It was told that it could award them in its discretion only after it found by clear and convincing evidence that the defendant was guilty of malice, oppression or fraud in the conduct upon which the jury based its finding of liability. The court then separately defined malice, oppression and fraud. It further defined clear and convincing evidence. The actual award of damages occurred in a bifurcated proceeding days later.

At the beginning of the second phase of the bifurcated proceeding, the trial court instructed the jury that its earlier instructions from the first phase of the trial applied to the second phase of its deliberations as well. It then explained to the jury that punitive damages could be awarded against the defendant for the sake of example and by way of punishment in an amount within the jury's discretion. Should it choose to award such damages, it would have to do so by clear and convincing evidence. The court explained that the law provides no fixed standard as to amount of puntive damages and that it leaves the amount to award within the jury's discretion as long as that discretion is exercised without passion or prejudice. The court explained that the jury should consider the reprehensibility of the defendant's conduct, the amount of punitive damages which will have a deterring effect on the defendant in light of the defendant's financial condition, and that punitive damages must bear a reasonable relationship to the actual damages suffered.

These instructions were far more comprehensive than the instructions employed by the Alabama trial court in the *Haslip* case. The United States Supreme Court found no infirmity in the Alabama procedures. Because the instructions read to the jury in the instant action are more comprehensive than those used to charge the Alabama jury in *Haslip*, we find that Boswell has failed to show that the instructions employed by the trial court in charg-

ing the jury in the instant action denied it due process under the Fourteenth Amendment of the United States Constitution.

We further find that Boswell was afforded meaningful review of the jury's punitive damage award by both the trial court and by this court. Though the *Haslip* court noted that it was possible for a jury to be charged with such absolute discretion that its award of punitive damages could violate due process, we find that this is not such a case. Furthermore, our own Supreme Court has upheld the constitutionality of our system of awarding punitive damages. The California Supreme Court has upheld our procedures for awarding punitive damages against claims that Civil Code section 3294 is unconstitutionally vague because it fails to provide sufficient guidance to trial courts and juries. (*Bertero* v. *National General Corp.*, *supra*, 13 Cal.3d 43, 66, fn. 13.) We are bound by the California Supreme Court's determination of this issue. (*Auto Equity Sales, Inc.* v. *Superior Court* (1962) 57 Cal.2d 450, 455.)

Instructions.

Boswell believes the punitive damage award has to be reversed because it offered BAJI No. 14.71 defining despicable conduct as conduct so vile, base, contemptible or loathsome that it would be looked down upon and despised by decent and ordinary people. The trial court rejected Boswell's despicable conduct instruction. Boswell contends the jury was left free to speculate as to the meaning of this term.

Family Farmers respond that Boswell did not offer the instruction until after arguments had been completed and until after the jury had already been instructed as to the principles governing punitive damage awards. Family Farmers further contend that Boswell requested the instruction after the jury had retired to deliberate.

Boswell does not deny that it made a tardy request for the additional instruction. Boswell's failure to refute Family Farmers' contention shows that it failed to make a timely request for the proffered instruction.

Proposed jury instructions must be submitted before the first witness is sworn or before the commencement of argument. (Code Civ. Proc., § 607a.) Had the proffered instruction been submitted to the court before closing argument commenced, it would have been a timely request for the instruction. (*Ng* v. *Hudson* (1977) 75 Cal.App. 3d 250, 259.) Boswell waived this issue at trial when it failed to submit it to the trial court in a timely manner pursuant to section 607a of the Code of Civil Procedure. Such noncompliance justifies a court's refusal to give the instruction. (*Richmond Redevelopment Agency* v. *Western Title Guarantee Co.* (1975) 48 Cal.App.3d 343, 353.)

Sufficiency of the evidence.

Boswell contends Family Farmers failed to meet their burden of proving by clear and convincing evidence that Boswell was guilty of malice. We note that all of the evidence of malice presented as proof of the malicious prosecution cause of action and discussed in detail above is sufficient to satisfy Family Farmers' burden by clear and convincing evidence. If, for example, the jury found true the allegations by Family Farmers that Boswell conducted a pattern of complex activities designed to save itself money in the Proposition 9 campaign and to silence its critics, such conduct would easily meet the requirements of Civil Code section 3294 that Boswell's activities were conducted with malice, oppression or fraud. There is no merit to this contention.

Disproportionality and excessiveness.

Boswell argues that the punitive damage award does not bear any reasonable relation to the actual damages suffered. The punitive damage award is approximately

3½ to 1 compared to the jury's original award of $1 million in compensatory damages for each cross-complainant. The trial court, however, reduced the compensatory damage award by remittitur from $1 million per cross-complainant to $200,000 per cross-complainant. The proportion of punitive damages to compensatory damages after the remittitur is 17.5 to 1. In its remittitur order, the trial court expressly found the punitive damage awards were neither excessive nor the product of passion and prejudice and they bore a reasonable relationship to the compensatory damages as reduced by the trial court.

Punitive damages equal to almost 27 times the award of compensatory damages have been held as reasonable. (*Devlin* v. *Kearney Mesa AMC/Jeep/Renault, Inc.* (1984) 155 Cal.App.3d 381, 391.) Ratios as high as 74 to 1 were affirmed by the California Supreme Court in *Neal* v. *Farmers Ins. Exchange* (1978) 21 Cal.3d 910, 927-929. (*Devlin* v. *Kearney Mesa AMC/Jeep/Renault, Inc., supra*, 155 Cal.App.3d 381, 393-396.)

There is no rigid formula to use in determining whether the compensatory damage awards are in a particular ratio with the punitive damage awards. In another case in which the ratio of punitive damages to compensatory damages was in excess of 14 to 1 and where the total punitive damage award was $10 million which represented less than one-quarter of 1 percent of the defendant's assets, the court nevertheless concluded that the punitive damage award was so excessive and grossly disproportionate to the defendant's wealth and to the compensatory damages awarded that it suggested passion and prejudice. (*Rosener* v. *Sears, Roebuck & Co.* (1980) 110 Cal.App.3d 740, 751-753.)

The trial court's remittitur order could be construed as setting forth the grounds for passion and prejudice in the instant case. There is no rigid formula we can use to determine whether the amount of punitive damages awarded was excessive. The fact that the trial court

found the jury was swayed by passion in the award of compensatory damages is not inconsistent with its finding that the jury was not swayed by undue prejudice in awarding punitive damages. The punitive damage proceeding was bifurcated from the liability phase of the trial. Several days passed between the jury's verdict on liability and the commencement of the punitive damage phase of the trial. It cannot be said the trial court's judgment in the remittitur was irrational or arbitrary.

The two concepts are actually intertwined and are discussed at the same time in the *Rosener* case. Extensive time was spent in the punitive damages phase of the trial reviewing Boswell's overall net worth. Boswell attempted to show its net worth was limited to the equity or book value. Boswell's assets would be limited to only $232 million.

Family Farmers, however, attempted to show the actual value of Boswell's assets exceeded $800 million. Family Farmers did demonstrate that the total value of Boswell's assets was in the neighborhood of $400 million, but this was valuing all of Boswell's land and water assets at only $63.8 million. One of Boswell's experts, Merlin Findley III, placed the value of Boswell's assets at $358 million.

These figures ignore the fact that Boswell farms 156,000 acres. Boswell owns 150,000 acres. This included properties bought in the last century or at the turn of this century for $3 an acre. If these properties are worth more than $3 an acre, the actual value of Boswell's water and property assets far exceeds the $63.5 million claimed by Boswell at trial.

Subtracting Boswell's liabilities from its total assets, however, the total net value of Boswell's assets was $119 million, though Boswell was described as a very lightly levered company without much debt. One witness testified that the book value of Boswell's assets was substantially below the actual value of those assets.

Taking all these factors into consideration, the $10.5 million punitive damage award was not excessive in light of Boswell's total assets, in light of the reduced compensatory damage award, in light of the bifurcated nature of the punitive damage phase of the trial, and in light of the trial court's instructions to the jury. The punitive damage award would represent slightly under 10 percent of Boswell's total net assets, but only 1.3 percent of Boswell's gross assets. The punitive damage award is not excessive or disproportionate.

VI.

ALLEGED MISCONDUCT OF COUNSEL AND ADMISSION OF EXPERT TESTIMONY

A. *Counsel's alleged misconduct.*

Boswell contends that trial counsel improperly swayed the jury by depicting it as a ruthless corporation that sought to prey upon small helpless farmers. Boswell objects to counsel's reference to it as a virtual giant and as a ruthless and unfeeling corporate monster intent upon destroying Family Farmers. Boswell claims that counsel for Family Farmers attempted to describe his own clients as patriotic American farmers singlehandedly trying to save the Constitution from ultimate destruction by Boswell. Boswell also objects to alleged references to it as being like a communist country, like Ivan Boesky, and that its management resembled the regime of Nazi leaders.

The flaw in Boswell's argument is that it takes most of opposing counsel's comments to the jury and closing argument out of context. The best way to understand counsel's comments is to look at those comments within the overall context of counsel's closing arguments to the jury.

Counsel stated to the jury that corporations were designed for making money. He noted they could also be

mindless monsters in pursuit of profit. Counsel explained to the jury that the Boswell corporation was out to have their way. According to counsel, Boswell was willing to say or do whatever it took to win. He pointed out that Boswell placed over $1 million into the compaign and that if Boswell needed more it would have spent more. Counsel also argued that Boswell would do virtually anything to maintain its money and considered the political campaign akin to war; that they were willing to sabotage the other side's lines of supply and sources of revenue. Counsel pointed out that the losing campaign had a smaller budget than the no on Proposition 9 by $1.3 million.

Counsel argued that Boswell refused to do business with a Union Oil distributor in Corcoran unless that business followed Boswell's lead in the no on 9 campaign. Counsel claimed Boswell found out people's fears and took advantage of them.

Counsel argued that Boswell was capable of stepping on the truth. He admitted, however, that Boswell did have environmental concerns which swayed it against the peripheral canal and they had proposed a reworked delta plan.

Counsel did not deny he was representing small farmers and they were fighting "a virtual giant." Counsel claimed that litigation was a familiar weapon to Boswell's executives. He argued that Boswell used the lawsuit as a political weapon against Family Farmers. He even sarcastically disparaged Chertok's research because every judge and court that looked at the statements set forth in the advertisement saw them as being privileged.

So far, these comments were all supported by evidence set forth in the record. At worst, counsel was drawing reasonable inferences from a pattern of conduct by Boswell that was highly questionable and motivated by considerations that led Boswell to abuse process and to maliciously prosecute an action without sufficient basis.

Counsel then argued that Boswell wanted to teach a lesson to people who had the audacity to exercise their rights as Americans, rights that cut against the position of the Boswell corporation. Counsel argued that a virtual financial giant held Family Farmers in litigation with a $2.5 million judgment hanging over their heads. He characterized Boswell as being ruthless and its executives as being the kind of people who would look at you and shut down your business and have people lose jobs and say that it really does not bother them. Boswell's lawsuit was described as a fraudulent piece of litigation. Boswell was again described as a ruthless and unfeeling corporate giant.

Counsel contended that under the Constitution everyone was supposed to be equal. He asked the jury to be appreciative of Family Farmers' constitutional rights and to protect their rights of life, liberty and the pursuit of happiness. Counsel explained that to deny one the ability to exercise one's rights and to oppress them was something associated with communist countries. Counsel also described Boswell's complete disregard for the rights of citizens as a reflection of the kind of mentality that "the German leaders had in World War II."

These last three comments perhaps give the initial appearance of being the most inflammatory comments made by counsel. However, in the overall context of the litigation which was long, complex and drawn out, the comments may not be so inflammatory. To the extent that Boswell did attempt to silence its critics to gain advantage in a political campaign through the abuse of process and by maliciously prosecuting an action, counsel's analogies may be reasonably inferable and not unfair.

Most importantly, Boswell did not at trial specifically object to these comments, make a timely assignment of misconduct or request the jury be admonished to disregard the impropriety. Boswell's failure to object to these comments constituted a waiver of its claim of mis-

conduct. (*Sabella* v. *Southern Pac. Co.* (1969) 70 Cal.2d 311, 319; *People* v. *Gordon* (1990) 50 Cal.3d 1223, 1255.) An advocate is permitted to argue his case and is not limited to some Chesterfieldian sense of politeness. (*People* v. *Bandhauer* (1967 66 Cal.2d 524, 529.) An advocate has the right to strike hard blows as long as they are not foul ones. (*People* v. *Talle* (1952) 111 Cal.App.2d 650, 677-678.) Aggressive advocacy is not only proper but desirable. Our system of jurisprudence has been built upon the firm belief in the adversary system. (*Marcus* v. *Palm Harbor Hospital, Inc.* (1967) 253 Cal.App.2d 1008, 1014.) Furthermore, counsel has the privilege to descant upon facts proved or admitted and to comment upon the conduct of the parties. Counsel can carry illustrations as far as his or her imagination and intellect will carry them. (*People* v. *Molina* (1899) 126 Cal. 505, 508.) We find no error.

B. *Expert testimony.*

Boswell argues that the trial court improperly admitted the testimony of George Pring, a law professor, and Edmund Constantini, a political scientist. These men were offered as expert witnesses by Family Farmers. Boswell argues that the testimony of both witnesses was highly prejudicial because it was based on pure surmise, conjecture and speculation. Where an expert's opinion is based on factors which are speculative, remote or conjectural, that opinion has no evidentiary value. (*Pacific Gas & Electric Co.* v. *Zuckerman* (1987) 189 Cal.App.3d 1113, 1135-1136.)

Pring testified he was in the process of conducting a study about a new trend in litigation which he characterized as strategic lawsuits against political participation. His study consisted of a review of 100 lawsuits which, like the instant case, were allegedly commenced for the purpose of preventing individuals from speaking out and participating in the political process. He also extensively reviewed the file and depositions of key witnesses in this

case. Pring testified that the ultimate result of such lawsuits would be a nation of people staying home and not participating as citizens in their own government out of fear of being sued. The targets of these lawsuits eventually win at an 85 percent rate. The purpose of this lawsuit, according to Pring, was to chill citizens' future political activity to teach them there is a price to pay for getting involved in the future of government decision-making.

Constantini testified generally that Boswell's campaign tactics and techniques were frequently used by others involved in political campaigns. Constantini believed that Boswell could not have had a reasonable good faith belief in the merits of its libel action against Family Farmers. The trial court did point out that there was no way to qualify someone on the state of mind of another person. Boswell contends that Constantini could not give a legal opinion on a question of law which was within the province of the trial court to decide. (*Sheldon Appel Co.* v. *Albert & Oliker*, *supra*, 47 Cal.3d 863, 884.) *The Sheldon Appel* case holds that it is error to permit witnesses, especially attorneys, to be called as experts to give their opinions as to whether a reasonable attorney would conclude that the claims advanced in an underlying action are tenable. (*Ibid.*)

Family Farmers contend they offered the testimony of Pring and Constantini to establish four essential elements of their case. They were attempting to prove ulterior purpose or motive for abuse of process, ulterior purpose distinct from that of enforcement of rights alleged for the malicious prosecution action, malice in the sense of either actual intent to injure or of conscious disregard for the rights of others in punitive damages, and that Boswell's conduct affected persons other than Family Farmers for punitive damages purposes.

Constantini's testimony does appear to be of limited relevance in light of the *Sheldon Appel* holding. Any ob-

jection to Pring's somewhat speculative testimony goes more to the weight of his testimony than its admissibility. Pring's testimony did focus on the very difficult to prove issue of Boswell's motive and ulterior purpose in filing the libel action. Experts have great latitude in relying on studies and even hearsay opinions of other experts. *Sheldon Appel* would allow testimony on the issue of malice within the context of the malicious prosecution cause of action. (See *Mosesian* v. *Pennwalt Corp.* (1987) 191 Cal.App.2d 851, 860-862.)

Even assuming that the testimony of Pring and Constantini is wholly inadmissible, Boswell has failed to demonstrate how it was actually prejudiced by the testimony of these two witnesses given the context of the entire litigation and all the other evidence submitted against it. Each of the points testified to by the experts were supported by substantial evidence from other sources which has been reviewed in detail above. There was already testimony concerning the impact of the libel action on cross-complainants' political activities.

To the extent that the testimony of these witnesses went to the issue of probable cause, it was clearly inadmissible. To the extent that it could be construed as evidence of other issues such as motive or intent, it has bearing, it being up to the trier of fact to give weight to that evidence as it sees fit. Most importantly, Boswell has failed to show how this evidence prejudiced it in light of the overwhelming facts in support of Family Farmers' theory that it set forth a complex scheme to abuse process and to maliciously prosecute an action in order to silence its opponents in the campaign over Proposition 9.

Thus, even assuming the introduction of the testimony was erroneous, appellant has failed to show how the error is prejudicial. Error, standing alone, is not enough to mandate reversal. This is especially true where the error in admitting evidence is merely cumulative or corroborative of other evidence properly in the record. A different

result absent the admissions of the testimony must be more reasonably probable than not. (*Continental Baking Co.* v. *Katz* (1965) 68 Cal.2d 512, 527-532; *Gallo* v. *Peninsula Hospital* (1985) 164 Cal.App.3d 899, 904-906.) Furthermore, reversal is not mandated under the California Constitution unless the court can find it is reasonably probable that a result more favorable to the appealing party would have been reached in absence of the error. (*Ibid.*; also see 9 Witkin, Cal. Procedure, *supra*, Appeal, §§ 325, 338, pp. 335-336, 345-346.) We do not so find.

CROSS-APPEAL

Family Farmers contend the trial court's issuance of a remittitur was improper for two reasons. First, they claim the trial court failed to give adequate reasons for conditionally granting the motion for new trial. Second, Family Farmers contend there was an insufficient factual basis for the trial court to reduce their damages from $1 million each to $200,000 each.

Trial courts must state reasons for conditionally granting a motion for new trial unless a party accepts an additur or remittitur to the award of damages. (*Mercer* v. *Perez* (1968 68 Cal.2d 104, 115-116.) Furthermore, a court cannot just recite ultimate facts in support of its order. This would defeat the legislative purpose behind Code of Civil Procedure section 657. (*Scala* v. *Jerry Witt & Sons, Inc.* (1970) 3 Cal.3d 359, 369-370.) The court must do more than state the legal basis for granting the motion and stating as its reasons for granting the motion conclusory statements of ultimate fact. (*Miller* v. *Los Angeles County Flood Control Dist.* (1973) 8 Cal.3d 689, 696-699.)

The judge's order in the instant case stated that the motion for new trial was conditionally granted on the sole ground that the amount of compensatory damages awarded to each plaintiff was excessive. The court found,

after reading the entire trial transcript and having weighed the entire available record of the trial, the jury clearly should have reached a different decision as to the *amount* of compensatory damages. The trial court concluded that the amount of the compensatory damage award was excessive and resulted from the jury's passion and prejudice against the defendant engendered by a David versus Goliath character in the case.

The trial court further found the cross-complainants had each suffered emotional distress over a substantial period of time due to the acts of Boswell. The court found, however, the emotional distress was not disabling. The cross-complainants had not suffered any permanent damage and they had failed to prove any special damages. Though Family Farmers had increased business costs after Boswell's acts, they had not proven those increased costs were attributable to Boswell's acts. Presumably, this comment referred to the increased costs of insurance for each of the cross-complainants. The trial court held that considering each of the foregoing factors, $200,000 was at the top range of fair and reasonable compensatory damages that could be awarded to cross-complainants for emotional distress. The court then found that the punitive damages awarded by the jury bore a reasonable relationship to the compensatory damages as reduced by the court and that the punitive damages had not been excessive and were not the product of passion or prejudice.

These findings are far more than mere conclusory statements of ultimate fact. A trial court need not cite the page and line of the record or discuss the testimony of particular witnesses. (*Scala* v. *Jerry Witt & Sons, Inc.*, *supra*, 3 Cal.3d 359, 370.) Family Farmers argue that the *Scala* case requires that the trial court cite to the part of the record to which it is referring. Its finding regarding the David versus Goliath nature of the case, however, is not easily susceptible to such specific reference because trial counsel's arguments in that regard occurred through-

out the trial and could be found in several different places within the transcript. *Scala* does not require the trial court to refer to particularized portions of the transcript or the testimony of individual witnesses.

The main requirements for orders conditionally granting remittitur or additur in lieu of a motion for new trial is that the order not be conclusory. As long as the trial court states a reason for granting the additur or remittitur and that reason is not a conclusory statement of ultimate fact, the court's order should be affirmed on appeal. Where the trial court picks an amount and therefore states the extent to which it regards the jury award as unreasonable, that in itself is an adequate statement by the trial court as to what the *amount* of damages should be in the case. (*Sanchez* v. *Hasenchamp* (1980) 107 Cal.App.3d 935, 941-942.)

The trial court's findings are not conclusory because the finding that the jury was swayed by passion and prejudice in the award of compensatory damages is the ultimate finding of fact. The reason stated by the trial court for the jury to be swayed by that passion and prejudice was the David versus Goliath nature of the case. This was evidenced throughout the transcript, and the trial court did not have to specify specific instances to prove its point. The court's award of $200,000 as the top range of fair and reasonable compensatory damages is itself sufficient because the court had picked the amount of fair damages and stated by that finding the extent to which it regard the jury award as unreasonable. (*Sanchez* v. *Hasenchamp*, *supra*, 107 Cal.App. 3d 935, 941.) Finally, the fact that the judge who conditionally granted the new trial motion unless cross-complainants accepted a remittitur is not the same judge who tried the case does not change the judge's authority to validly make the order. Though the judge was different, he or she still has the same broad discretion as though he or she had been the trial judge. (*Kershner* v. *Morgali* (1957) 152 Cal.App.2d

884, 885; *Cohen* v. *Cohen* (1952) 110 Cal.App.2d 738, 738-740.)

Family Farmers' second argument, that there was insufficient evidence from which the trial court could conditionally grant the new trial motion, is also not well taken. Family Farmers contend that only the jury could act as the trier of fact in awarding damages and cites several authorities which stand for that proposition of law. Those authorities, however, cannot be controlling in a case such as this where the trial court finds that the underlying basis for the jury's award of damages was undermined by the fact they were swayed by passion and prejudice against one party and in favor of another.

Code of Civil Procedure section 657 significantly limits the scope of appellate authority to review a new trial order. (*Jones* v. *Citrus Motors Ontario, Inc.* (1973) 8 Cal.3d 706, 710-711.) All assumptions must be made in favor of the order granting the new trial. Appellate courts will reverse a trial court's findings and ruling only if a manifest and unmistakable abuse of discretion is shown. (*Martinides* v. *Mayer* (1989) 208 Cal.App.3d 1185, 1197.)

The trial court in the instanct action carefully weighed the evidence and found that Family Farmers had been subjected to persistent, long-term emotional distress and they had suffered significant injuries. It further found that the jury was unduly swayed to award compensatory damages far in excess of what had been proven due to passion and prejudice as a result of the David versus Goliath nature of the case. Neither party is satisfied with the trial court's ruling. Boswell still maintains there was absolutely no proof that Family Farmers suffered any injuries which would justify the award of compensatory damages. Family Farmers are dissatisfied that their million compensatory damage awards were reduced by $800,000 each. This court, however, cannot substitute its judgment for the trial court's judgment. Neither side has

shown that the trial court's order were the result of a manifest or unmistakable abuse of discretion. In the absence of a showing of such manifest and unmistakable abuse of discretion, we affirm the trial court's conditional order of a new trial, and Family Farmers' acceptance of a remittitur in lieu of a new trial.

DISPOSITION

The judgment is affirmed. Cross-complainants shall recover their costs on appeal.

/s/ Harris
HARRIS, J.

WE CONCUR:

/s/ Best
BEST, P. J.

/s/ Ardaiz
ARDAIZ, J.

APPENDIX B

Fifth Appellate District No. F011230
S022154

IN THE SUPREME COURT
OF THE STATE OF CALIFORNIA
IN BANK

KEN WEGIS, *et al.*,
Appellants

v.

J. G. BOSWELL COMPANY,
Appellant

Petition for review DENIED.

Lucas, C.J. is of the opinion the petition should be granted.

/s/ Lucas
Chief Justice

APPENDIX C

SUPERIOR COURT
OF THE STATE OF CALIFORNA
IN AND FOR THE COUNTY OF KERN

Date: Mon., September 19, 1988

Court met at 10:00 AM, Department No. 5

Present: HON. LEN M. MCGILLIVRAY, Judge
S. M. Brumfield, Deputy Clerk

No Reporter No Bailiff

THOMSON, THOMSON, AND WEGIS, ETC., *et al.*

vs.

J.G. BOSWELL CO., ETC., *et al.*
Action No. 179027

MINUTES

COUNSEL:

KLEIN, WEGIS, AND DUGGAN, by Ralph Wegis

BIANCO, MEANS AND MCBURNIE, by Harvey Means; SHEARMAN AND STERLING by Richard B. Kendall

NATURE OF PROCEEDINGS:

Action No. 179027

I. MOTION FOR JUDGMENT NOTWITHSTANDVERDICT: The motion is *denied*.

II. MOTION FOR NEW TRIAL: The motion is *conditionally granted* on the sole ground that the amount of compensatory damages awarded to each Plaintiff is excessive, the condition being the re-

fusal of each Plaintiff to accept a reduction in the amount of compensatory damages awarded to $200,000 to each plaintiff:

A. The Court (this judge), which was not the trial court in this case, has read, considered and weighed the entire available record of the trial, and is convinced therefrom that the jury clearly should have reached a different decision as to the amount of compensatory damages awarded to each Plaintiff.

B. The Court concludes and finds that the award of damages was excessive due to the jury's passion and prejudice against Defendant engendered by the "David vs. Goliath" character of the case.

C. The Court finds that although Plaintiffs each suffered emotional stress over a substantial period of time due to the acts of Defendant, said emotional stress was not disabling; Plaintiffs suffered no permanent damage; no special damages were proved; and Plaintiffs' increased business costs, after the acts of Defendant, were not proved to be attributable to Defendant's acts.

D. Considering the foregoing, the Court finds that $200,000 is at the top of the range of fair and reasonable compensatory damages which could be awarded in this case as to each Plaintiff.

E. The Court finds that the punitive damages awarded by the jury as to each Plaintiff bear a reasonable relationship to the compensatory damages awarded as reduced by the Court, and that said punitive damages awards are neither excessive nor the product of passion or prejudice.

LMM